Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KYLEEN FISCHER,

Petitioner,

v.

STATE OF FLORIDA, DIVISION OF ELECTIONS AND THE FLORIDA ELECTIONS COMMISSION,

Respondents.

Petition for Writ of Certiorari from the First District Court of Appeal of the State of Florida

---

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Can the State of Florida impose punishment upon candidates for political office for statements made in the course of a political campaign which, as a matter of law, are not violative of the standard established in *New York Times v. Sullivan*, 376 U.S. 254(1964).

PARTIES TO THE PROCEEDING

The Petitioner is Kyleen Fischer who was a candidate for election to the School Board of Lake County, Florida, at the general election held in November of 1994.

The Respondents are the Division of Elections of the State of Florida and the Florida Elections Commission, which are responsible for enforcing Florida's election laws.

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STATEMENT OF BASIS FOR JURISDICTION

On January 3, 1997, The Florida Elections Commission (the "Commission") rendered an order finding that Kyleen Fischer ("Fischer") violated Section 104.271(2), F. S. (1995), on two occasions by disseminating false statements about an opposing candidate with actual malice. Appendix I. Fischer timely appealed this decision to the First District Court of Appeal of the State of Florida (the "District Court"). Appendix II.

On January 23, 1998, the District Court rendered a *"per curium affirmed"* decision without opinion affirming the decision of the Commission. Appendix III. On January 27, 1998, the District Court rendered a corrected *"per curium affirmed"* decision without opinion affirming the decision of the Commission, which indicated that there was a dissent to the District Court's decision. Appendix IV.

On February 9, 1998, Fischer timely filed a motion for rehearing or clarification with the District Court noting that this case presented a question of first impression and raised significant First Amendment issues. Appendix V. On March 3, 1998, the District Court, with one judge dissenting, denied Fischer's Motion for Rehearing or Clarification. Appendix VI.

Fischer has exhausted all avenues of appeal or review under Florida law. In *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980), the Florida Supreme Court held that on or after April 1, 1980, it lacked jurisdiction to review *per curium* decisions of the district courts of appeal without opinion. No other jurisdiction granted under Florida law would permit review by the Florida Supreme Court or any other judicial body. *See*, Article V, Section 3, Fla. Const. Appendix VII.

Counsel for the Florida Elections Commission has been notified that Fischer intends to seek a writ of certiorari from this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are the First Amendment to the Constitution of the United States and Section 104.271(2), F.S. (1995), which provides as follows:

> (2) Any candidate who, in a primary election or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code. An aggrieved candidate may file a complaint with the Division of Elections pursuant to s. 106.25. The division shall adopt rules to provide an expedited hearing before the Florida Elections Commission of complaints filed under this subsection. Notwithstanding any other provision of law, the Florida Elections Commission shall assess a civil penalty of up to $5,000 against any candidate found in violation of this subsection, which shall be deposited to the account of the General Revenue Fund of the state.

STATEMENT OF THE CASE

In 1994, Fischer was a Republican candidate for the School Board in Lake County, Florida. Fischer had previously served on the School Board having won a four-year term in the 1982 general election. She was defeated for reelection in 1986. Fischer had primary opposition in both the first and second primaries in 1994.

Fischer's opponent in the 1994 election was Sandra Green ("Green"), the incumbent who had won election to the School Board as a Republican in 1990. However, Green had changed parties and was running as a Democrat in 1994. Green had no primary opposition in 1994. Fischer and Green were the candidates at the general election held in November of 1994.

Fischer's campaign produced two political advertisements which are the subject of this case: a flier which was mailed to voters in Umatilla, a small town in northeast Lake county, and a radio advertisement which began airing on the Saturday before the election.

The flier was developed by Fischer's daughter, Leah, who volunteered in her mother's campaign. The subject of the flier was the possible consolidation of Umatilla High School with Eustis High School. Leah Fischer had learned of this issue in a conversation with Holly Newby, the Editor of *The North Lake Outpost*. Leah Fischer and Ms. Newby researched past issues of *The North Lake Outpost* and found the only article on the issue in the November 26, 1992 edition. That article became the basis for the flier.

In the fall of 1992 during School Board budget workshops, Green proposed the consolidation of Eustis and Umatilla High

Schools as an alternative to the expenditure of millions of dollars to upgrade current facilities. Though no other support was voiced for the proposal at the workshop, Green called a meeting of approximately 12-15 persons comprised of teachers, parents, and former students of hers, to discuss the consolidation idea. The meeting was held in early November 1992. It was clear from the meeting that residents of Umatilla did not support the consolidation concept. During the meeting, Green indicated she would try to arrange a visit to Lyman High School, a consolidated high school in Orange County. On November 26, 1992, an article appeared in *The North Lake Outpost*, a weekly newspaper circulated in the Umatilla area, which reported on the meeting Ms. Green had held and provided comments from some who attended the meeting.

Prior to arranging for such a visit, however, Green learned of a meeting of residents of Umatilla in opposition to the consolidation idea. As a result, Green did not arrange a visit to Lyman High School and did not actively pursue the consolidation issue further.

The campaign flier consisted of a single sheet of 8-1/2 x 11" paper folded in half. The front flap contains a statement in capitalized, bold letters "**ONE SCHOOL BOARD CANDIDATE WANTS TO CLOSE UMATILLA HIGH SCHOOL.**" The top half of the inside flap of the flier identifies Democratic candidate Sandra T. Green in response to the statement on the front flap. Immediately below that identification is a reproduction of the masthead of *The North Lake Outpost* with the date November 26, 1992. Immediately under the masthead and date is the headline from the newspaper article of that date and two paragraphs excerpted from the article. Following those two paragraphs in a box is an excerpt

from another paragraph from the article. The boxed portion reads:

> DEMOCRAT GREEN STATE:
> "Green said ... she personally favored consolidation for Eustis and Umatilla."
>
> - The North Lake Outpost

Following that, on the lower flap of the inside portion of the flier is a line of stars creating a "definition break" and demarcating the end of the newspaper article and the beginning of campaign statements in support of Fischer and her position on consolidation of Umatilla High School, which she opposed. The outside of the back flap contains additional campaign statements regarding Fischer's support for a separate high school for Umatilla and requesting support for Fischer's election.

The November 26, 1992 article in *The North Lake Outpost* represents the only published article regarding the possibility of consolidating Umatilla High School and Eustis High School. Green subsequently never made any public statements or issued any press releases on the issue.

The second campaign advertisement at issue here is a radio advertisement which aired on WKIQ-AM. The ad falsely stated that the NAACP had endorsed Sandra T. Green. Fischer admitted that the statement is false, and the only issue contested in the lower tribunal was whether the statement was made with actual malice.

The single most important issue in the School Board races, at least in the African-American community, was the future of

Eustis Middle School. The building was located in the African-American community in Eustis and had served that community as a school facility for many years. In the spring of 1994, the School Board had voted to renovate the existing facility rather than build a new school. The vote was 3-2 with Green voting in the minority. She wanted to build a new school at a different location.

There were three seats on the School Board up for election in 1994, and the African-American community wanted to preserve the majority on the School Board who supported keeping the Eustis Middle School at its present site.

During the general election campaign, Fischer developed a 10-point education platform which stated her positions on a variety of issues. In her platform, Fischer advocated building a new Eustis Middle School and converting the old site into a vocational school. However, Fischer did not indicate support for a specific site for the new school building.

Tom Poole ("Poole") was a leader in the minority community in Lake County. A former school teacher and coach, he had served for over 25 years as President of the Tri-City Branch of the NAACP, as well as serving on the state, regional, and national levels of that organization. He also served a President of the Voter's League of Lake County, a political committee formed for the purpose of voter education, registration and participation among the minority community.

During each election cycle since its formation in 1978, the directors of the Voter's League met to discuss and make endorsements in election campaigns. The process was informal and generally was determined based on a consensus of directors in attendance. The endorsement decisions of the Voter's

League of Lake County were disseminated to minority voters by mailing a sample ballot showing the endorsed candidates.

In the 1994 School Board elections, there was no consensus among the directors of the Voter's League of Lake County on the Fischer/Green race. The decision was delegated to Poole as President.

Neither Fischer nor Phillips were familiar with the Voter's League of Lake County. The Voter's League is not a high profile organization. Fischer did not have any African-Americans active in her campaign. Because of Poole's high profile with the NAACP, both Phillips and Fischer assumed that any endorsement by Poole was an NAACP endorsement.

On the Thursday or Friday prior to the election, Poole ran into Ron Phillips ("Phillips"), a volunteer campaign consultant for Fischer. The two men knew each other well. Phillips had been a student of Poole's years earlier and still referred to Poole as "Coach." The conversation primarily focused on endorsements in the upcoming county elections.

The result of the conversation is disputed. Phillips came away from the conversation with the understanding that Poole and his organization (NAACP) would be endorsing Green. Poole denies that he indicated any endorsement in the Green/Fischer race. He did, however, tell Phillips the name of the candidate who was endorsed in another race. Poole knew that Phillips' primary interest was an endorsement in the Fischer race, and he admitted that he did not give him a direct answer.

Based on his understanding of this conversation with Poole, and fearing a late movement in the campaign and the possibility

of being sandbagged by this late development, Phillips recommended, and Fischer agreed, to develop an ad. The primary purpose of the ad was to reiterate Fischer's stand on the Eustis Middle School issue. The ad ran twice on the Saturday prior to the general election and once on Monday morning prior to the general election.

The endorsement of the Voter's League of Lake County ultimately went to Fischer. Poole stated he made the decision on a "glimmer of hope." Despite Fischer's platform position, Poole perceived she was open on the issue of the Eustis Middle School because she had not advocated a specific new site for the school and because she had not yet had the opportunity to vote officially on the issue.

When the error was brought to her attention on Monday morning, both Fischer and Phillips, who helped develop the ad, called the radio station, apologized to the NAACP, and asked that the ad be removed from the air.

On November 22, 1994 when the Division of Elections ("Division") received a sworn complaint alleging violations of Florida's election law by Fischer. After an investigation by the Division to determine whether the facts alleged in the Complaint constituted probable cause to believe that Fischer had violated Section 104.271(2), F.S., was violated. On December 27, 1995, the Complainant, pursuant to Section 106.25(7), F.S., filed a notice with the Commission appealing the finding of no probable cause by the Division.

On February 2, 1996, the Commission heard the appeal and on February 9, 1996, reversed the finding of the Division and entered an Order finding that there was probable cause to believe that Fischer violated Section 104.271(2), F.S. On

February 28, 1996, Fischer timely filed her request for a formal hearing and requested the appointment of a hearing officer with the Division of Administrative Hearings to conduct the administrative hearing.

A formal hearing before the Commission commenced on June 6, 1996 in Tallahassee, Florida. At the formal hearing, Fischer presented an oral motion to dismiss the charges against her relating to the publication of the flier concerning school consolidation. Fischer's motion was denied.

At the hearing on June 6, 1996, the Division presented the oral testimony of David Bradford, an investigator for the Division of Elections, and Tom Poole, Chairman of the Lake County Voter's League. Following those witnesses, the hearing was continued until the Commission's next meeting on August 2, 1996 in Orlando, Florida. At the reconvened hearing, the Division presented the oral testimony of Green, the Complainant, who was Fischer's opposing candidate in the election. The Division also presented the oral testimony of Fischer. The Division offered one exhibit which was admitted into evidence, presented the testimony of Ron Phillips, a volunteer in the Fischer campaign, and offered one exhibit. Fischer and the Division each timely filed written closing argument and proposed final orders.

On September 12, 1996, the Commission issued a notice of formal hearing indicating that it would take up the matter at its meeting on October 4, 1996. At its meeting on October 4, 1996, the Commission, in light of the written submissions, dispensed with oral argument and found that Fischer, in two separate campaign advertisements, made false statements about an opposing candidate and that such statements were made with actual malice. The Commission ordered Fischer to pay a total

of $5,500.00 for the two separate violations. The Commission's written final order was issued on January 3, 1997. Appendix I.

Section 104.271(2), F.S. (1995), purports to be consistent with the *New York Times v. Sullivan* standard and its progeny which permits limitations on political speech. Application of the standard has been central to the Division's prosecution of the complaint against Fischer since the initial stages. It was central to Fischer's post-hearing submission to the Commission. Appendix VIII. It was raised by Fischer in her Initial Brief on appeal to the District Court.

ARGUMENT

The First Amendment, made applicable to the states through the Fourteenth Amendment, embodies a

> profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

In *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. *Garrison v. Louisiana, supra*, held that the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. 379 U.S. at 67. The *New York Times* rule is likewise applicable in this case where the State of Florida, through an administrative agency, endeavors to regulate and punish political speech. *Pestrak v. Ohio Elections Commission*, 926 F.2d, 573, 578 (6th Cir. 1991).

As applied by Florida's Fourth District Court of Appeal:

> So great is the protection given to writers and speakers under the First Amendment that the Supreme Court has held that a *public official*, such as a plaintiff in this case, can make out a good claim of damages for defamatory

> falsehood only where the official can show that the writer published a defamatory falsehood with knowledge that it was false, or with reckless disregard as to whether is true or false. *New York Time Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Stated differently, the burden is to show that the writer deliberately lied and falsified something or, as an alternative to a knowing lie, that the writer of a defamatory falsehood "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), or that he acted with a "high degree of awareness of *** probable falsity, " *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Moreover, the official must prove the essential fact, not with the ordinary evidentiary burden of most civil cases, called the "greater weight" of the evidence in Florida, but instead with a higher, more demanding, burden called "clear and convincing" evidence. *Id.* (*footnote omitted*)

Seropian v. Forman, 652 So.2d 490, 493-494 (Fla. 4th DCA 1995).

By finding a violation of Section 104.271(2), F.S., with respect to the flier, the Commission seeks to punish Fischer for true statements, albeit in a form not approved by the Commission, and for statements of opinion and comment relating to the truthful statement. There is no dispute in the record to the accuracy of the statement that "Sandra Green... personally favored consolidation of Eustis and Umatilla" high

schools. The Commission disagrees with the phrasing of the statement by the Fischer campaign on its flier. The Commission focuses on the fact that Sandra Green had not made any public statements on the consolidation issue since 1992.

While the Commission seeks to control the quality of the information about an opposing candidate during the course of a campaign, this is not an appropriate or constitutional role for the Commission. The Commission is placing itself in the position of defining the issues that can be addressed in a campaign by restricting the ability of the candidates to raise issues that they view as important and significant. It is not the Commission's role to determine whether a statement made in 1992 is an appropriate issue. Rather

> [t]he decision as to which contender for a political office should be entrusted with the power of that office rests exclusively with the people. They are entitled to all the information that each candidate can provide about himself, his opponent and their respective positions on the relevant political issues. The entire process is hampered if the information is restricted or unavailable. The public's "need to know" is most critical during an election campaign.

Sadowski v. Shevin, 345 So.2d 330, 333 (Fla. 1977).

The Commission's view of its role cannot be squared with the First Amendment.

The Commission noted that the statement in the flier that "Green said... she personally favored consolidation for Eustis and Umatilla" was never made by Sandra Green. The

Commission, likewise, notes that the flier omitted qualifying language that was "material to the campaign" and that "[w]ithout the qualifying language the statement implied that Ms. Green would act on her own to bring about the consolidation of Eustis and Umatilla high schools." The Commission concluded Fischer made the statement with actual malice because she knew the truth and elected to disregard it. Yet the flier contained a reproduction of the masthead of the newspaper where the article appeared with the date of the article and three paragraphs from that article.

The Commission's conclusion is not supported by United States Supreme Court precedent. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the Supreme Court held that the failure of a news magazine article to state that the article regarding a Civil Rights Commission Report on police brutality, which contained "allegations" of brutality against a public official rather than proven instances, was not a falsification sufficient in itself to justify a finding of actual malice. In that case, the Court concluded:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability

> on errors of interpretation or judgment than on errors of historical fact.

401 U.S. at 290-291. In this case, the Commission focuses on the allegedly ambiguous statements contained in the quotation and ignores the essential truth of Green's statement, namely that she favors consolidation.

Similarly, the Commission concludes that it was false for the flier to state that Green wants to close Umatilla High School. Green's consolidation proposal contemplated Eustis Middle School moving to the Eustis High School and Umatilla Middle School moving to the Umatilla High School, and the construction of a new consolidated high school to replace both existing high schools. This proposal would effectively close Umatilla High School. While the Commission concludes that Green did not advocate the consolidation of Eustis or Umatilla High Schools or the closing of Umatilla High School "during the 1994 elections" , the record clearly reflects her proposal to do so during her term on the School Board.

In finding a violation of Section 104.271(2), F.S., with respect to the radio advertisement, the Commission focuses on the "reckless disregard" prong of the *New York Times* rule. To support its conclusion that Fischer acted with "reckless disregard" of whether statements contained in the radio advertisement were true or false, the Commission found that both Fischer and her campaign advisor, Ron Phillips, "were shocked when they mistakenly jumped to the conclusion that Mr. Poole (and the Voter's League) was going to support Ms. Green." The Commission found that the Fischer campaign failed to take any steps to verify the endorsement.

Failure to investigate does not itself establish bad faith.

New York Times v. Sullivan, *supra*, at 287-288. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact ascertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) With respect to establishing a requirement of absolute verification, it has been stated:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to a nondefamatory matter.

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) Within the facts established at the hearing before the Commission, there was no other source other than Tom Poole, with whom to verify the reported endorsement. The endorsement decision had been delegated solely to Poole. No other member of the Voter's League was in a position to verify the endorsement information.

The Commission's conclusion that the radio ad, which implied that Sandra Green had made a "political deal" in return for the NAACP's endorsement, was produced with actual malice fails to meet the constitutional threshold required by the *New York Times* rule. The evidence was constitutionally defective to support a finding by the Commission that allegedly false statements were made "about an opposing candidate." *See*, Section 104.271(2), F.S. The advertisement does not state that Green made a deal. It states clearly and unequivocally that Fischer will not make any political deals. [Jt. Exhibit 14] The

reference that Green made a deal is implied by the Commission. It is akin to legal alchemy by which the Commission creates a false statement where none is made, imputes motive, and concludes that punishment is warranted.

The constitutional danger implicit in the Commission's actions are the same as noted in *New York Times v. Sullivan*, *supra*, when statements which were attacks on government were imputed to be attacks on the officials of whom the government is composed:

> Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. (*footnote omitted*) We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.

New York Times v. Sullivan, *supra*, at 292. The evidence relied upon the by the Commission to find a violation of Section 104.271(2), F.S., was constitutionally insufficient to support a finding that a statement was made about an opposing candidate.

Even assuming that it is appropriate to imply from the ad that it falsely states that Green made a deal, such a statement is a statement of opinion, not of fact. The United States Supreme Court has stated that

> [U]nder the First Amendment there is no such

> thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries to correct but on the competition of other ideas.

Gertz v. Robert Welsh, Inc., 418 U.S. 323, 339-40 (1974). As a statement of opinion, the statement is entitled to constitutional protection.

CONCLUSION

For these reasons stated a petition of writ of certiorari should be issued by this Court.

Dated this 10th day of August, 1998.

Respectfully Submitted,

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STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

Division of Elections,
Petitioner,

v.

Case No.: FEC 94-122
F.O. No.: DOSFEC 96-88

Kyleen Fischer,
Respondent.
_____/

FINAL ORDER

THIS CAUSE came on to be heard at formal hearings held before the Florida Elections Commission (Commission) on June 6 and August 2, 1996, in Tallahassee and Orlando, Florida.

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STATEMENT OF THE ISSUE

Whether the Respondent violated Section 104.271(2), Florida Statutes, when she made false statements with actual malice about Sandra Green, her opposing candidate, on two occasions during the 1994 elections to the Lake County School Board.

PRELIMINARY STATEMENT

On November 22, 1994, the Division of Elections received a sworn complaint alleging violations of Florida's election laws. The division conducted an investigation to determine whether the facts alleged in the complaint constituted probable cause to believe that the Respondent violated Section 104.271(2), Florida Statutes.

On November 27, 1995, the Director of the Division of Elections signed a Statement of Findings determining that there was no probable cause to believe that Section 104.271(2), Florida Statutes, was violated. On December 27, 1995, the Complainant filed a notice with the Commission, as provided in Section 106.25(7), Florida Statutes, appealing the Division of Elections' dismissal of the case based on the finding of no probable cause.

On February 2, 1996, the Florida Elections Commission heard the appeal and on February 9, 1996, entered an Order of Probable Cause finding that there was probable cause to believe that the Respondent violated Section 104.271(2), Florida Statutes. The Respondent timely requested a formal hearing.

On March 25, 1996, the Respondent filed a Motion for Appointment of Division of Administrative Hearings' Hearing

Officer to Conduct Formal Hearing. The Division responded and the motion was set for hearing before the Commission on April 5, 1996, in Tampa, Florida. The Commission, after hearing arguments of counsel, issued an order on April 12, 1996, denying Respondent's motion.

The Respondent was noticed to appear before the Commission for formal hearing on June 6, 1996, in Tallahassee, Florida. At the formal hearing, The Respondent presented a Motion to Dismiss the charges against her and a Motion in Limine to exclude any evidence that identified any allegedly false statements contained in the campaign material of the Respondent other than those statements identified in the Division's answers to interrogatories. The Commission denied both motions. The Division and Respondent presented a Joint Stipulation of Facts and 24 joint exhibits, all of which were admitted into evidence.

The Division also presented the oral testimony of David Bradford, investigator for the Division of Elections, and Tom Poole, Chairman of the Voter's League of Lake County. The hearing was adjourned until the next meeting of the Commission on August 2, 1996, in Orlando, Florida.

At the reconvened hearing, the Division presented the testimony of Sandra Green and Respondent Kyleen Fischer, and one exhibit that was admitted into evidence. The Respondent presented the testimony of Ron Phillips, a volunteer in the Kyleen Fischer campaign, and offered one exhibit.

Two transcripts were prepared in this case. Therefore, the "T1" cite used below refers to the transcript for the June 6, 1996, meeting and the "T2" cite refers to the transcript for the August 2, 1996, meeting.

FINDINGS OF FACT
I - Overview

1. The Florida Elections Commission is charged with enforcing Section 104.271(2) and Chapter 106, Florida Statutes, the campaign financing law.

2. Kyleen Fischer (Republican) and Sandra Green (Democrat) were opposing candidates for the Lake County School Board, District 5 seat, in the 1994 general election. Ms. Green lost the election by 1170 votes. (Exhibit 17)

3. Ms. Fischer had primary opponents in the first and second primaries. (T2 - 32-34) She had previously served on the School Board from 1982-1986, when she was defeated for re-election. (T2 - 104) Ms. Green, on the other hand, was the incumbent, first elected in 1990. Ms. Green had no primary opponents in 1994. (T2 - 31) (Exhibit 15)

4. The Fischer campaign was run with a volunteer staff that primarily consisted of the candidate; her daughter, Leah Fischer; Judy Susie Farley, the campaign manager; Ron Phillips, a family friend and experienced political operative who served as advisor and consultant; and other friends and family. (T2 - 112, 142-143, 167-169)

5. On November 22, 1994, the Division of Elections received a sworn complaint signed by Sandra Green alleging that Kyleen Fischer had published and circulated political advertisements that contained false and malicious statements about Sandra Green, in violation of Section 104.271(2), Florida Statutes. (Exhibit 21) One such advertisement was a campaign flyer published by Ms. Fischer that concerned the consolidation of the Eustis and Umatilla high schools. (Exhibit 13) The other

was a radio advertisement that aired on WKIQ in Eustis during the last weekend of the campaign and concerned the alleged endorsement of Ms. Green by the NAACP. (Exhibit 14)

II - The Flyer

6. The Fischer campaign, with the candidate's review and approval, produced a political advertisement as a mailing flyer during the general election campaign. (T2 - 76-78, 169) (Exhibit 13) The flyer dealt with Green's purported advocacy of the consolidation of the Eustis and Umatilla high schools and closure of Umatilla High School, a position (if it had been espoused by a candidate) which would have been of great importance in the campaign. (T2 - 145, 149, 153) The flyer was mailed to residents in Umatilla, a community of approximately 2200.

7. Leah Fischer's statement indicated that she learned of the possibility of the consolidation issue being used against Ms. Green from Holly Newby, editor of the North Lake Outpost, when they were discussing issues of concern to the residents of Umatilla. (Stipulation ¶3) Leah Fischer and Ms. Newby researched past issues of the North Lake Outpost and found the only article regarding Green's position on the issue in the November 26, 1992 edition. (Stipulation ¶3)

8. Kyleen Fischer, Leah Fischer and Ron Phillips participated in drafting the language that was used in the political advertisement. (Stipulation ¶4) In drafting the language in the political advertisement, they relied exclusively on the newspaper article. (T2 - 77) The Fischer campaign mailed the political advertisement to the Umatilla area the week prior to the general election. (T2 - 77, 149) The political advertisement was paid for from the Fischer campaign account.

(Exhibit 6)

9. The political advertisement contained the following statement: "One School Board Candidate Wants to Close Umatilla High School." (E.S.) (Exhibit 13) This statement was not true. Sandra Green testified that she did not want to close Umatilla High School in 1994. (T2 - 20) In fact, in the Spring of 1994, Ms. Green and the Lake County School Board voted to spend several million dollars on a new media center for Umatilla High School, further showing that she did not intend to seek to close the high school in 1994. (T2 - 20, 60) At no time during the 1994 elections did Ms. Green advocate either the consolidation of Umatilla and Eustis high schools or the closing of Umatilla High School. (T2 - 20)

10. The political advertisement also contained the following statement: "A group of parents and teachers from Eustis and Umatilla, under the guidance of school board member Sandra Green are examining the possibility of consolidating Umatilla and Eustis High Schools." (E.S.) (Exhibit 13) This statement was also untrue. The only meeting held by Ms. Green to examine the possibility of consolidating Umatilla and Eustis high schools was held two years before the 1994 elections. (T2 - 24) No meetings were held to discuss this issue during the 1994 elections. (T2 - 24)

11. The Lake County School Board never formally considered the consolidation of Umatilla and Eustis high schools. (Stipulation ¶6) The only time the issue was mentioned was at a 1992 workshop session on facilities funding. (Stipulation ¶6) At that time, Ms. Green suggested consolidating Eustis High School and Umatilla High School as an alternative to spending approximately $26 million needed to upgrade facilities at those two schools. No support was

expressed by other board members in attendance at the workshop. (Stipulation ¶6)

12. In November of 1992, after the School Board workshop, Sandra Green called a meeting of approximately 12 to 15 teachers, parents, and former students to discuss consolidation of the Eustis and Umatilla high schools. (Stipulation ¶7) Also at the meeting were representatives from South Lake High School, a high school that had already been consolidated. (Stipulation ¶7)

13. Paul Bryan, formerly a student of Sandra Green's and currently a resident of Umatilla, attended the meeting. (Stipulation ¶8) Mr. Bryan opposed the consolidation of the two schools. (Stipulation ¶8) Mr. Bryan stated that Sandra Green appeared to be in favor of consolidation, but she did not state at the meeting that she would pursue the issue after the meeting. (Stipulation ¶8)

14. Teena Stoneking, another former student of Sandra Green's and a Umatilla resident, attended the meeting and spoke in opposition to consolidation. (Stipulation ¶9) Ms. Stoneking stated that Ms. Green appeared to favor consolidation, but she did not hear Ms. Green state that she would pursue the issue. (Stipulation ¶9)

15. Both Bryan and Stoneking said that they expected the issue of consolidation to be discussed further in a public setting. (Stipulation ¶10) After the meeting, they formed a group of Umatilla residents to oppose the issue. (Stipulation ¶10) They both stated that they never heard Sandra Green discuss the issue again until Kyleen Fischer circulated the attached political advertisement in her 1994 campaign for a seat on the school board. (Stipulation ¶10)

16. The political advertisement continued as follows: DEMOCRAT GREEN STATED: "Green said...she personally favored consolidation for Eustis and Umatilla." (E.S.) (Exhibit 13) This statement was untrue. Although the advertisement said, "DEMOCRAT GREEN STATED," the advertisement quoted the North Lake Outpost article and not Ms. Green. (T2 - 81) Ms. Green never made the statement quoted in the advertisement. (T2 - 27, 80 - 81) The newspaper's reporter paraphrased Ms. Green when she wrote, "Green said while she personally favored consolidation for Eustis and Umatilla, and the expanded curriculum it should bring, that it would ultimately be up to the parents to decide whether to proceed with the concept or not." (Exhibit 23)

17. The language in the flyer also omitted the language that qualified Ms. Green's position on consolidating the high schools without indicating that the qualifying language was omitted, thus rendering the statement in the flyer misleading. (T2 - 81, 83) This omission was material to the campaign. Without the qualifying language, the statement implied that Ms. Green would act on her own to bring about the consolidation of Eustis and Umatilla high schools. Such a position would have inflamed public opinion against her in light of the importance to small communities such as Eustis and Umatilla of retaining their local high schools.

18. Kyleen Fischer stated that she had reasonable grounds to believe that Sandra Green favored the consolidation of the Eustis and Umatilla high schools, as Sandra Green had stated in 1992. (Stipulation ¶11) Ms. Fischer based her statement on the fact that she had no information that Sandra Green had changed her stand on this issue. (Stipulation ¶11) However, Ms. Fischer said that she never heard Ms. Green make a public statement during the 1994 elections that she wanted to close Umatilla

High School. (T2 - 78) Further, Ms. Fischer testified that she never saw any campaign literature during the 1994 elections in which Ms. Green said she wanted to close Umatilla High School. (T2 - 78)

19. Sandra Green stated that the newspaper article that was quoted in the political advertisement was two years old. (Stipulation ¶12) Since 1992, she never publicly sought or indicated a subsequent desire or intent to close Umatilla High School. (Stipulation ¶12)

20. Sandra Green stated in May of 1996, that she still personally considered consolidation of two schools a good idea, because it would allow for an expanded curriculum as well as other benefits for students. (Stipulation ¶13) However, she also stated that if she were a school board member, she would rely on the input of her constituents on the issue. (Stipulation ¶13) She still believes that it would ultimately be up to the parents and students to decide the issue. (T2 - 17, 18)

III - The Radio Advertisement

A - The Broadcast

21. The Fischer campaign aired a political advertisement on WKIQ radio station in Eustis the weekend before the election. The advertisement was broadcast on several dates, possibly on Friday, November 4, 1994; twice on Saturday, November 5, 1994, during the Florida State University football game; and once on Monday, November 7, 1994, the day before the election. (T2 - 31, 150, 158-59, 186)

The advertisement stated as follows:

> During the 1994 elections season here in Lake County, we have seen many political deals. There is one Republican School Board candidate who refuses to make political deals. Kyleen Fischer has refused to change her position on building a new Eustis Middle School. This position has cost her politically. The NAACP has endorsed her opponent, Sandra T. Green. Kyleen Fischer will not make political deals with out children's future. On November 8, vote "No" on political deals. Vote "Yes" for Kyleen Fischer, School Board. Paid Republican Political Ad, Campaign Fund for Kyleen Fischer. (Exhibit 14)

22. The single most important issue in the school board race was the fate of the Eustis Middle School that was in a state of disrepair. (T1 - 158, 169, 171) The Eustis Middle School, formerly the all black Cartwright High School, was located in and serviced the African-American community in Eustis. (T1 - 169) In the Spring of 1994, the Lake County School Board, by a vote of three to two, decided not to build a new middle school, but to repair the existing school. (T1 - 169) The dissenting members, one of whom was Sandra Green, wanted to build a new school at a different location.

B - The Voter's League, the NAACP, and Endorsements

23. In the 1994 elections, three of the five school board seats were up for election. (T1 - 169) The African-American community was very interested in retaining its majority on the issue and in electing candidates who wanted to keep the Eustis

Middle School at its present site. (T1 - 170) As a result, Tom Poole, President of the Voter's League of Lake County, became actively involved in evaluating each candidate's position on the Eustis Middle School and providing that information to the African-American community. (T1 - 153)

24. The Voter's League of Lake County is a political committee that was formed in 1978 to encourage individuals in the minority community to register and vote and to provide education and guidance to the community on the position of candidates on issues important to the minority community. (T1 - 153) Since 1978, it has been the practice of the League, on the Thursday or Friday prior to each election, to mail to each member of the African-American community in Lake County a sample ballot marked with the names of the candidates endorsed by the League. (T1 - 159) In the 1994 Lake County School Board election, the endorsement of the League was based exclusively on the candidate's position on the Eustis Middle School. (T1 - 185)

25. The general procedure used by the League in selecting candidates began with the League holding a preliminary meeting of its directors who come from each of the communities in Lake County. (T1 - 162) The directors would talk generally about each race and assign people to research each candidate. (T1 - 160, 193-195) Researching each candidate involved reading newspaper accounts about the candidate, examining the candidate's record, listening to speeches, and reading campaign literature. (T1 - 161, 162)

26. The directors would meet again approximately a week before the election and mark a sample ballot with their selections. (T1 - 163) The ballot would be given to the area directors who mailed the ballot to all minority voters in their

home town. While no formal notice to candidates of an endorsement was made by the Voter's League, the endorsed ballot was also mailed to the candidates on the Thursday or Friday before the Tuesday election. (T1 - 163-164, 210 242)

27. The League would not make a public announcement of its endorsements, other than the mailings, because it wanted to avoid the possibility that the candidate who was not endorsed would use it against the candidate who was. (T1 - 165-166, 179, 232) Mr. Poole testified that residents in lake County know that the sample ballot comes from the Voter's League of Lake County. (T1 - 195, 211)

28. The Voter's League of Lake County had been a consistent supporter of Kyleen Fischer during her political career. (T1 - 107) The League first supported Ms. Fischer when she ran successfully for the school board in 1982. (T1 - 158) (Exhibit 3) The League also supported her in the 1994 Republican primaries for the District 5 school board seat. (T1 - 32) (Exhibit 8) Finally, the League actually selected Kyleen Fischer over Sandra Green in the 1994 general election for the School Board of Lake County, District 5. (Exhibit 16)

29. Tom Poole was president of the Tri-City branch of the National Association for the Advancement of Colored People (NAACP) from 1968 until 1994. (T1 - 151) The constitution of the NAACP prohibits all of its branches from endorsing candidates. (T1 - 153) (Exhibit 2) The Tri-City Branch of the NAACP (which includes the school board district) did not endorse either Sandra Green or Kyleen Fischer in the school board race. (T1 - 99, 153; T2 - 135) (Exhibit 2)

30. Prior to the radio advertisement aired by the Kyleen Fischer campaign, Mr. Poole had never seen any candidate

advertise that the NAACP endorsed his candidacy for public office. (T1 - 154-155, 250-251) Mr. Poole testified that the radio advertisement is the first time in his experience in Lake County politics that a candidate has asserted that the NAACP, instead of the Voter's League of Lake County, endorsed a candidate. (T1 - 248) Ms. Green testified that she knew the NAACP did not endorse candidates. (T1 - 99; T2 - 31-32, 35)

31. Mr. Poole testified that the reason why the Voter's League of Lake County endorsed Kyleen Fischer over Sandra Green was because Sandra Green was "deadly opposed" to the Eustis Middle School staying at its present location. (T1 - 170) Mr. Poole believed that there was no flexibility in Ms. Green's position; she was "solid" on the issue. (T1 - 172)

32. Further, Ms. Green had publicly taken a position against leaving the school in its present location. (T1 - 170; T2 - 41) While a member of the Lake County School Board, Ms. Green had voted to move the school to a new site. (T1 - 170; T2 - 41) (Exhibit 25) Ms. Green proposed establishing a magnet school on the Eustis Middle School site. (T1 - 238-239) (Exhibit 25)

33. Kyleen Fischer, however, was viewed by the African-American community as the swing vote on the issue of relocating the Eustis Middle School. (T1 - 171, 233) Mr. Poole spoke to Ms. Fischer early in the campaign and Ms. Fischer said she was open on the issue. (T1 - 172, 222) Although as the campaign progressed, Ms. Fischer indicated that she favored a new Eustis Middle School, she never took a firm position on the site of the new school before she aired the radio advertisement. (T1 - 173; T2 - 40, 108-110) Bob Green, the radio announcer for WKIQ, said on the air the Monday before the election that he had spoken to Ms. Fischer and while she said she favored a new Eustis Middle School, she would remain open on the

location of the school, if elected. (T1 - 120)

34. Mr. Poole talked to Ms. Fischer during the last month of the campaign, and he also said that she had told him that she remained open on the issue of the location of the new school. (T1 - 202-207) Ms. Fischer's Ten Point Plan simply indicated that if the school was moved to a different location, she favored a vocational high school on the old site. (T1 - 204-205; T2 - 53-54) Her plan did not advocate building a new school at a different site. (T1 - 205; T2 - 41) (Exhibit 12)

35. On the issue of the Eustis Middle School, Mr. Poole's position and the position of the Voter's League of Lake County was clearly more consistent with the position of Ms. Fischer than with Ms. Green's. (T1 - 170-175) Further, if the Eustis Middle School was not going to remain at its present location, Ms. Fischer's alternative, to locate a vocational school at the site, was more acceptable to Mr. Poole and the Africa-American community than Ms. Green's alternative, to locate a magnet school at the site. (T1 - 174-175, 238-239)

36. Ms. Fischer testified that Ms. Green told he repeatedly during the campaign that Mr. Poole for the Voter's League of Lake County endorsed her. (T2 - 107-108) At a round table discussion in mid-October of 1994, Ms. Green told Ms. Fischer that Mr. Poole endorsed her. (T1 - 89) Ms. Fischer responded by saying that she appreciated the endorsement. (T1 - 89) She went on to say that she would like to see that school stay in the community as a vocational high school. (T1 - 89)

37. Ms. Green never solicited the endorsement of the Voter's League of Lake County during the campaign. (T2 - 49) In fact, she never spoke with Mr. Poole about the Eustis Middle School issue. (T2 - 36) She recognized that her position was

contrary to the position of the League. (T2 - 49)

38. Ms. Green did not make any deals with the NAACP, the League, or Mr. Poole. (T1- 184-187; T2 - 50) The statement in the radio advertisement that Ms. Green had been endorsed by the NAACP was false, a fact conceded by Ms. Fischer (Respondent's Proposed Findings of Fact 26)

C - The Poole — Philips Meeting and the Creation of the Radio Advertisement

39. On Friday, November 4, 1996, Tom Poole and Ron Phillips met outside the offices of the Lake Sentinel in Tavares. (T1 - 176-182, 221-224, 249) (Exhibit 20) Ron Phillips asked Tom Poole whether he was going to support Ms. Fischer in the election. (T1 - 176-182, 221-224, 249) Mr. Poole asked Mr. Phillips why he should support Ms. Fischer. (T1 - 176-182, 221-224, 249) Mr. Phillips gave Mr. Poole a summary of Ms. Fischer's strong points. (T1 - 176-182, 221-224, 249)

40. Mr. Poole then explained how important the Eustis Middle School issue was and told Mr. Phillips that he and his organization needed to know where Ms. Fischer stood on that issue. (T1 - 176-182, 221-224, 249) Mr. Phillips waffled and Mr. Poole replied that he knew where Sandra Green stood on the issue. (T1 - 176-182, 221-224, 249) Mr. Phillips took that statement to mean that Mr. Poole was going to support Sandra Green. (T1 - 176-182, 221-224, 249) (Exhibit 22)

41. While Mr. Phillips also testified that Poole told him that "we are going to go with the other lady (Green)," it is the Commission's finding, in light of the fact that Mr. Poole and the Voter's League had not yet made a formal decision, that this statement is not credible. (Exhibit 22)

42. Shortly after his conversation with Mr. Poole, Mr. Phillips called Ms. Fischer to tell her about his conversation with Mr. Poole. (T2 - 205) Both Ms. Fischer and Mr. Phillips testified that he told Ms. Fischer that Mr. Poole said that the NAACP was endorsing Sandra Green. (T2 - 180) However, for the reasons set forth in Paragraph 41, the Commission finds that the testimony of both Ms. Fischer and Mr. Phillips is not credible on this point.

43. Mr. Phillips signed an affidavit indicating that he asked Mr. Poole whether he had cut a deal with Ms. Green. (Exhibit 20) He further indicated in his affidavit that in response, Mr. Poole smiled. (Exhibit 20) Mr. Poole denied any conversation about a political deal. (T1 - 184-185) He said that he did not make a deal with Ms. Green and that in his 28 years in Lake County politics he had never made a political deal. (T1 - 184-185, 187) He also said that Mr. Phillips did not ask him whether a deal was made. (T1-182)

44. Ms. Fisher testified that Mr. Phillips did not tell her that Mr. Poole had made a deal with Ms. Green. (T2 - 112-113) Mr. Phillips did not mention it when he called her shortly after his conversation with Mr. Poole or when he met her at the radio station to edit and record the radio advertisement. (T2 - 160-161) Clearly no evidence of a political "deal" between Mr. Poole and Ms. Green was communicated by Mr. Phillips to Ms. Fischer.

45. Both Ms. Fischer and Mr. Phillips testified that they were shocked when they mistakenly jumped to the conclusion that Mr. Poole (and the Voter's League) was going to support Ms. Green. (T2 - 216) (Exhibit 20) Mr. Phillips felt that way because it was his understanding that Ms. Green's position on the Eustis Middle School was diametrically opposed to Mr.

Poole's. (T2 - 216) Ms. Fischer was shocked because she expected to get the endorsement of the Voter's League. (T2 - 117) Although both Ms. Fischer and Mr. Phillips were surprised and nonplused at the news of the "endorsement," Ms. Fischer aired the radio advertisement before taking any steps to verify the "endorsement." (T2 - 117-118)

46. During the telephone conversation with Ms. Fischer, Mr. Phillips suggested that they go public on the issue. (T2 - 181-182) Mr. Phillips, therefore, wrote the advertisement, and Ms. Fischer joined him at the radio station and edited and helped record the radio advertisement. (T2 - 150-151, 160) The Fischer campaign paid for the radio advertisement. (Exhibit 6)

47. When the political advertisement spoke of "political deals," one of the "deals" that Ms. Fischer was referring to was a "deal" on the Eustis Middle School. (T2 - 97) Mr. Poole testified that everyone in the community understood the radio advertisement to mean that Ms. Green had made a political deal on the Eustis Middle School with the NAACP to get its endorsement. (T1 -245-246) No such deal had been made and the Fischer campaign had no evidence pointing to such a deal.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and the subject matter of this cause, pursuant to Sections 104.271 and 106.26, Florida Statutes.

2. The Respondent is charged with violating Section 104.271(2), Florida Statutes, which provides as follows:

> Any candidate who, in a primary election or other election, with actual malice makes or

> causes to be made any statement about an opposing candidate that is false is guilty of a violation of this code.

3. Therefore, to prove a violation of this section, the Division must prove by clear and convincing evidence[1] the following four elements: 1) The Respondent made or caused to be made the statement at issue in the case. 2) The statements were made about a candidate opposing the Respondent. 3) The statements made about the opposing candidate were false. 4) The Respondent made the statements with actual malice.

4. As to both the flyer and the radio advertisement, there is no dispute that the first two elements are present. Both advertisements were produced and authorized by Ms. Fischer and both were explicitly aimed at her opponent, Ms. Green. Ms. Fischer admitted at the hearing that she helped draft and approved the flyer before it was mailed, and edited and helped record the radio advertisement before it was aired. Ms. Fischer also admitted, and her campaign treasurer's reports show, that she paid for both advertisements out of her campaign account. Both advertisements mentioned Ms. Green specifically and made factual assertions about Ms. Green's activities in order to sway voters to support Ms. Fischer in the campaign.

5. The evidence shows that the statements contained in the flyer and the radio advertisement were false and misleading. As a necessary corollary to the requirement that the statements be false, they must also be derogatory, defamatory, or otherwise be actionable as knowing misrepresentations of an opposing candidate's positions that are intended to result in damage to the

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[1] Dep't of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 933 (Fla. 1996); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

candidate's electoral prospects. Cf. State v. Petersilie, 432 S.E. 2d 832, 839 (N.C. 1993).

6. In determining whether the statements at issue herein are damaging or derogatory, it is necessary to analyze both the overall impact of and the implications contained in the statements. Cf. Jones v. American Broadcasting Companies, Inc., 694 F. Supp. 1542, 1551-1554 (M.D. Fla. 1988), aff'd (after remand), 961 F. 2d 1546 (11th Cir. 1990).

7. In the context of Section 104.271(2), Florida Statutes, it is clear, at the very least, that a false statement made about a candidate is actionable is such a statement damages the candidate by attributing a position to the candidate that is false. Clearly, in the midst of a campaign nothing is more damaging to a candidate than to have an opposing candidate make false assertions, purportedly based upon facts, which tie a candidate to positions that are unpopular with the electorate.

8. An examination of the flyer shows that it contained several false statements. During the 1994 elections, Ms. Green did not "want to close Umatilla High School," nor was she "examining the possibility of consolidating Umatilla and Eustis High Schools." Ms. Fischer testified that her campaign workers obtained material used to provide the statements in the flyer from a newspaper article in the North Lake Outpost printed two years before the election. Although Ms. Fischer did not hear Ms. Green make any statement or see her circulate any campaign material about the consolidation of Eustis and Umatilla high schools in the 1994 elections, Ms. Fischer worded the statements in the flyer in the present tense.

10. Ms. Green testified that she never wanted to close Umatilla High School, only to consolidate it with Eustis High

School. Ms.Green further testified that the only action she took regarding the consolidation of Eustis and Umatilla high schools was to call a meeting of teachers, parents, and former students to discuss the issue a full two years before the election. Ms. Green never sought or indicated a desire or intent to consolidate Umatilla and Eustis high schools after that meeting. In fact, she voted to build a several million dollar media center at Umatilla High School, further showing her intent not to close or consolidate the school. Therefore, these two statements made by Ms. Fischer in the campaign flyer were false.

11. However, the most egregious of the false statements in the flyer was the statement in the middle of the inside page that in large letters read: DEMOCRAT GREEN STATED: "Green said...she personally favored consolidation for Eustis and Umatilla." Green never made that statement and she testified that was not her position in the 1994 elections. The newspaper article from which Ms. Fischer obtained her information did not contain any quotations from Ms. Green. Although the flyer used the words: "DEMOCRAT GREEN STATED," Ms. Fischer actually quoted the reporter who wrote the newspaper article and not Ms. Green.

12. Further, the language quoted from the newspaper article was substantially altered to change its meaning. The statement that Ms. Green favored consolidation was qualified by the following language in the newspaper article at the <u>end</u> of the language quoted in the flyer: "that it would be ultimately up to the parents to decide whether to proceed with the concept or not."

13. The impact of the deletion of the qualifying language is amplified by the fact that the flyer was a targeted mail piece for the Umatilla area and was intended to tar Ms. Green with

actively espousing a position that, if implemented, would result in a small rural community losing its high school. The failure to include the qualifying language or to indicate that language was omitted substantially changed the meaning of the statement and would lead a reader to the conclusion that Ms. Green had announced a firmly held position to vote to consolidate the two high schools.

14. It takes no special knowledge to see that the attribution to Ms. Green of a position that would result in the substantial diminution of the Umatilla community's identity through the closure of its own high school would not have endeared her to the Umatilla electorate. It is obvious that the flyer was intended to damage Ms. Green's campaign in just this way. In light of the plain language of Section 104.271(2), Florida Statutes, clearly just such a tactic is intended to be prohibited by the statute, if the statements are false and disseminated with actual malice.

15. The radio advertisement also contained false statements. As admitted by Ms. Fischer in her Proposed Final Order, the NAACP does not endorse candidates running for public office. The constitution of the NAACP prohibits all branches of the organization from endorsing candidates. Mr. Poole, the president of the Tri-City Branch of the NAACP from 1968 to 1994, testified that the organization's's constitutional prohibition is adhered to by the Tri-City Branch. He further testified that it was the Voter's League of Lake County and not the NAACP that made endorsements. In fact, the Voter's League endorsed Ms. Fischer and not Ms. Green.

16. The radio advertisement, taken as a whole, falsely implied that Ms. Green made a deal with the NAACP on the Eustis Middle School to obtain its endorsement. As Mr. Poole

testified, everyone in the community understood the radio advertisement to mean that Ms. Green had made a political deal on the Eustis Middle School with the NAACP to get its endorsement. No such deal, however, had ever been made.

17. The law does not require that Ms. Fischer make an explicit statement that Ms. Green had made a political "deal" in order for her advertisement to make the defamatory assertion that Ms. Green lacked integrity.[2] What is required, is that the statement necessarily results in that conclusion and that the conclusion is false, because the "facts" upon which it is based are false.[3]

18. Since Section 104.271, Florida Statutes, regulates political speech, it must be construed in accordance with the United States Supreme Court's pronouncements concerning the

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[2] Once again, in the context of this particular campaign Green had publicly adopted a hard and fast stand which was contrary to the NAACP's (Voter's League's) position on the Eustis Middle School issue. Thus, such an assertion of a political "deal" could only be considered to be an attempt by Fischer to cast aspersions upon the integrity and character of Green by implying that Green had not stuck to her announced position but had reversed field in order to gain support.

[3] The advertisement's underpinnings are grounded in concrete real world assertions of fact—the NAACP endorsement, the Eustis Middle School issue and the implied volte-face on the part of Green to get the endorsement. Thus, the context of the radio advertisement shows that its assertions are not "imaginative expressions or rhetorical hyperbole" and are not in the realm of "false opinion" but are rather statements of purported fact and thus are within the ambit of unprotected speech if they are false and made with actual malice. Cf. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20-21, 110 S. Ct. 2695, 2706-2707 (1990), Pullam v. Johnson, 647 So. 2d 254, 256-258 (Fla. 1st DCA 1994) rev. den. 654 So. 2d 919 (Fla. 1995).

protection afforded this type of speech by the First Amendment to the United States Constitution.

19. In 1964, the Supreme Court in the case of the New York Times Co. v. Sullivan, 376 U.S. 254 (1964)[4], established the standard of what must be shown before a public figure can recover damages for a defamatory falsehood relating to his official conduct. New York Times v. Sullivan and it's progeny, therefore, must be followed in determining whether the facts of this case meet the "actual malice" standard required by the statute and the First Amendment. "Actual malice" requires a showing that the Respondent made the false statements with knowledge that the statements were false or with reckless disregard of whether they were true or false. Id. at 280.

20. The evidence shows that at the time Ms. Fischer mailed the flyer on consolidation to the Umatilla area one week before the election, she knew the false statements made in the flyer were, in fact, false. As Ms. Fischer testified, the flyer was based on the one newspaper article from the North Lake Outpost published in 1992. Ms. Fischer admitted that during the 1994 campaign, she had not heard Ms. Green make statements about the consolidation issue and she had not seen any other written material from the newspaper, Ms. Green, or the Lake County School Board on the issue. Therefore, when Ms. Fischer published the flyer on consolidation, she knew the truth and elected to disregard it.

21. As mentioned above, the false statement in the

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[4] In Sullivan, the police commissioner of Montgomery, Alabama sued certain civil rights and the newspaper for inaccuracies in a newspaper advertisement soliciting donations to the civil rights movement.

consolidation flyer that allegedly quoted Ms. Green was particularly egregious. The Supreme Court has recognized that quotation marks around a statement add authority to that statement. In Mason v. New Yorker Magazine,Inc., 501 U.S. 496, 511 (1991), the Supreme Court held:

> In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying upon the author's characterization of her subject.

22. Because quotation marks may be a devastating instrument for conveying false meaning, the Supreme Court concluded that the deliberate alteration of the words spoken by another may equate with knowledge of the falsity of the statement, if the alteration results in a material change in the meaning conveyed by the quoted statement and the material change defames or harms the alleged speaker. Id. at 517-520.

23. Here, Ms. Fischer attributed to Ms. Green a statement that was never made by Ms. Green. The language came from a newspaper article that did not attach quotation marks to any statement of Ms. Green and was at best an asserted paraphrase of Ms. Green by the reporter who wrote the newspaper article. Nevertheless, Ms. Fischer, in her flyer, attributed the actual

statement to Ms. Green herself by using quotation marks around the paraphrased material and by introducing the quoted language with the salutation — DEMOCRAT GREEN STATED.

24. Also, Ms. Fischer changed the meaning of the paraphrased material by omitting critical qualifying language used in the newspaper article and by leading the reader to believe that any language omitted from the statement did not relate to Ms. Green's position on the consolidation issue. Ms. Fischer's conduct was malicious, because she knew the truth and elected to disregard it.

25. Ms. Fischer's false statements made in her radio advertisement were also made with "actual malice." However, in this case, the advertisement was made with reckless disregard of whether the statements were true or false, rather than with actual knowledge that they were false.

26. The Court has explained the parameters of the "reckless disregard" portion of the definition of "actual malice." In Garrison v. Louisiana, 379 U.S. 64, 74 (1964),[5] the Court held that "only those false statements made with the high degree of awareness of their probable falsity ...may be the subject of either civil or criminal sanctions." The Court warned that "calculated falsehoods" do not enjoy constitutional protection. Id. In St. Amant v. Thompson, 88 S. Ct. 1323, 1325 (1968),[6] the

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[5] In Garrison, the New Orleans' district attorney was convicted pursuant to Louisiana's criminal defamation statute, based on his criticism of the local judiciary at a press conference.

[6] In St. Amant, a deputy sheriff sued a candidate for public office, claiming that the candidate's remarks about him in a televised

Supreme Court held that reckless disregard also means that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

27. Finding "actual malice" requires proof of the speaker's state of mind at the time that she circulated the false statement, Bose Corp. v. Consumers Union, 466 U.S. 485, 498, (1984). The speaker's state of mind may be proved either through direct evidence or circumstantial evidence. St. Amant, supra. Simple professions of good faith by the speaker are unpersuasive. Id. In determining whether the speaker had a high degree of awareness of the probable falsity of that statements contained in the political advertisement or whether she entertained serious doubts as to their truth, it is appropriate to look at the information the speaker had available to her at the time she spoke. McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501 (D.C. Cir 1996).

28. Although Ms. Fischer testified at hearing that she did not know the difference between the NAACP and the Voter's League of Lake County when she aired the radio advertisement, the evidence shows that her statement is not credible. Ms. Fischer is a successful and actively involved candidate in Lake County politics and has been for over 15 years. For virtually the same time period, beginning in 1978, the League also has been actively involved in Lake County, endorsing candidates and distributing sample ballots to the minority community.

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speech imputed gross misconduct to him.

29. In addition, Ms. Fischer was involved with the Tri-City Branch of the NAACP, at least to the extent of attending its annual Pass the Torch Banquet. In contrast to the League, the NAACP has never endorsed a candidate. In fact, it is prohibited by the NAACP constitution from doing so. Mr. Poole testified that Ms. Fischer's advertisement was the first time any candidate in Lake County has said that the NAACP endorses candidates.

30. Ms. Green, with less political experience than Ms. Fischer, knew that it was the League and not the NAACP that endorsed candidates. Ms. Green testified to those facts at the hearing, but she also made the same statement when she called WKIQ the Monday before the election challenging the truthfulness of the radio advertisement. Ms. Green told the commentator, Bob Green, that she knew it was not the policy of the NAACP to endorse candidates. She also said that a letter had gone out from the League indicating that it endorsed Ms. Fischer in the primary election.

31. Considering these facts, the Commission concludes that Ms. Fischer would have had obvious reasons to doubt any report from Ron Phillips, even if it had occurred, that the NAACP had endorsed a candidate in the Lake County School Board race. In addition, Ms. Fischer would have had obvious reasons to doubt that Ms. Green was the candidate endorsed.

32. As indicated above, during her political career, Ms. Fischer had enjoyed the consistent support of the Voter's League of Lake County. The League endorsed her for the first time in her 1982 race for the school board. The League also endorsed her in both primary elections in the 1994 race and Ms. Fischer knew that she had been endorsed by the League in the primaries. Ms. Fischer acknowledged that on many occasions

during the campaign that she was told by Ms. Green that the Voter's League endorsed her. One occasion in mid-October 1994, Ms. Fischer even stated her appreciation for the endorsement.

33. Another important factor in determining whether Ms. Fischer entertained serious doubts about whether the NAACP had endorsed Ms. Green, is the candidates' positions on the fate of the Eustis Middle School. Both candidates knew that the endorsement of the Voter's League of Lake County was going to be based on the single, most important issue in the campaign — whether to relocate or repair the Eustis Middle School. Ms. Fischer's position was much closer to the position of the League than was Ms. Green's. While Ms. Green voted at a school board meeting to build a new Eustis Middle School at a different site, Ms. Fischer never took a firm position on that issue during the campaign, and in October of 1994, she communicated this fact to Mr. Poole.

34. The evidence also shows that Ms. Fischer actively solicited the endorsement and support of the Voter's League of Lake County, while Ms. Green testified that she recognized the futility of seeking the endorsement and, therefore, made no effort to do so. As the president of the League, Mr. Poole's testimony on this question is persuasive. He said that Ms. Green was, as he put it, "deadly opposed" to keeping the Eustis Middle School at its present location; she was "solid" on the issue. Mr. Poole also said that the community viewed Ms. Fischer as the swing vote on this issue while Ms. Green had already taken a position publicly by her vote on the school board.

35. In further support of the Commission's conclusion that Ms. Fischer doubted the truth of the news that the NAACP was

endorsing Sandra Green was her reaction when she stated that she became "aware" of this "fact." Although both Ms. Fischer and Mr. Phillips seriously doubted the truth of the "endorsement" and were "shocked" that it had occurred, Ms. Fischer did not take any steps to verify the accuracy of Mr. Phillip's report.[7]

36. Ms. Fischer never explained upon what facts she based her statement made in the radio advertisement concerning Sandra Green being involved in "political deals." Ms. Fischer testified that Mr. Phillips never mentioned anything to her about a political deal. He never mentioned it when they had their telephone conversation shortly after Mr. Phillips' conversation with Mr. Poole; he never mentioned it when Ms. Fischer met him later at the radio station to edit and record the advertisement. The Commission, therefore, finds Ms. Fischer's statement in her radio advertisement that Green was making deals in return for the supposed NAACP endorsement, is either a fabrication without any basis in fact, or that it was so inherently improbable as to make its dissemination reckless. See St. Amant, supra.[8]

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[7] Although the failure to investigate before publishing not sufficient to establish reckless disregard, purposeful avoidance of the truth may be. Harte-Hanks Communication, Inc. v. Connaughton, 491 U.S. 657 (1989).

[8] The Supreme Court in St. Amant identified three types of circumstantial evidence that would likely support a finding of actual malice: They are evidence establishing (1) "where the story was fabricated," (2) "when the publisher's allegations are so inherently improbable that only a reckless man would put [it] in circulation," or (3) "where there are obviously reasons to doubt the veracity of the informant or the accuracy of his reports." St. Amant v. Thompson, 390 U.S. at 732.

37. The stated or implied factual premise for the defamatory allegation that Ms. Green had made "political deals" was that such had been made in return for the endorsement of the NAACP. Since that "fact" was untrue and Ms. Fischer was aware of the great likelihood of its untruthfulness, then it is apparent that the act of disseminating the radio advertisement, accusing Ms. Green of entering into a non-existent political deal in return for a non-existent endorsement, occurred with actual malice.

CONCLUSION

Based upon the foregoing facts and conclusions of law, the Florida Elections Commission finds that the Respondent violated Section 104.271(2), Florida Statutes, on two occasions by disseminating false statements about an opposing candidate with actual malice. Therefore, it is

ORDERED that the Respondent shall remit a civil penalty in the amount of $5500 based upon a fine of $2500 for the improper flyer and $3000 for the radio advertisement. The civil penalty shall be paid to the Florida Elections Commission, Room 2002, The Capitol. Tallahassee, Florida 32399-0250, within 30 days of the date this Final Order is received by the Respondent.

DONE AND ENTERED by the Florida Elections Commission and filed with the Clerk of the Commission on January 3, 1997, in Tallahassee, Florida.

/S/

Carlso Alvarez, Chairman
Florida Elections Commission
Room 2002, The Capitol
Tallahassee, Florida 32399-0250

Copies furnished to:

John Rimes, Assistant Attorney General
Barbara M. Linthicum, Assistant General Counsel
Sandra T. Green, Complainant
Chris Haughee, Attorney for Respondent
Kyleen Fischer, Respondent (certified mail)
Emogene W. Stegall, Filing Officer

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

DIVISION OF ELECTIONS,
Petitioner/Appellee,

vs. Case No. FEC 94-122
F.O. No. DOSFEC 96-88

KYLEEN FISCHER,
Respondent/Appellant.
_____/

NOTICE OF APPEAL

Notice is given that KYLEEN FISCHER, Appellant/Respondent, appeals to the First District Court of Appeal, the order of the State of Florida Elections Commission rendered on January 3, 1997. The nature of the order is a Final Order of the Florida Elections Commission finding that Kyleen Fischer violated Section 104.271(2), Florida Statutes, on two occasions by disseminating false statements about an opposing candidate with actual malice.

A conformed copy of the Final Order is attached to this Notice of Appeal.

Respectfully submitted this 3rd day of February, 1997.

/S/
CHRIS HAUGHEE
Florida Bar #242985

MARK HERRON
Florida Bar #199737

Akerman, Senterfitt & Eidson, P.A.
216 South Monroe Street, Suite 200
Post Office Box 10555
Tallahassee, Florida 32302-2555
(904) 222-3471

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Barbara Linthicum, Assistant General Counsel, Division of Elections, Room 2002, The Capitol, Tallahassee, Florida 32399-0250, this 3rd day of February, 1997.

/S/
CHRIS HAUGHEE

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIMES EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

KYLEEN FISCHER
Appellant,

v. CASE NO.: 97-435

DIVISION OF ELECTIONS,
Appellee.
_____/

Opinion filed January 23, 1998.

An appeal from an order of the Florida Elections Commission.

Christopher R. Haughee and Mark Herron of Akerman, Senterfitt & Eidson, P.A., Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; John J. Rimes, III, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM
AFFIRMED.

BENTON, VAN NORTWICK AND PADOVANO, JJ., CONCUR.

CORRECTED COPY 2/27/98

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIMES EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

KYLEEN FISCHER,
Appellant,

v. CASE NO.: 97-435

DIVISION OF ELECTIONS,
Appellee.
_____/

Opinion filed January 23, 1998.

An appeal from an order of the Florida Elections Commission.

Christopher R. Haughee and Mark Herron on Akerman, Senterfitt & Eidson, P.A., Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; John J. Rimes, III, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM
AFFIRMED.

VAN NORTWICK AND PADOVANO, JJ., CONCUR AND BENTON, J., DISSENTS without opinion.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

KYLEEN FISCHER,
Appellant,

v. CASE NO.: 97-435

DIVISION OF ELECTION,
Appellee.
_____/

MOTION FOR REHEARING OR CLARIFICATION

This Motion for Rehearing or Clarification is submitted pursuant to Rule 9.330, Florida Rules of Civil Procedure.

Rule 9.330(a), Florida Rules of Civil Procedure, requires that "a motion for rehearing or clarification shall state with particularity the points of law or fact that the court has overlooked or misapprehended." Because of the Court's "per curium affirmed" order, this is a practical impossibility without running afoul of the Rule's requirement that "[t]he motion shall not re-argue the merits of the court's order." Rule 9.330(a), Florida Rules of Civil Procedure.

The challenge to Section 104.271(1), Fla. Stat., raised by Appellant's appeal is a question of first impression and raises significant First Amendment issues. "A brief opinion in such cases, while understandably of little consolation to the unsuccessful appellant, would at least assuage the thought that the point had been overlooked." Brastrom v. Grider, 215 So. 2d 501 (Fla. 1968).

In Williams v. State, 627 So. 2d 524 (Fla. 1st DCA 1993), this Court granted a motion for clarification as to the basis of a "per curium affirmed" decision, apparently concluding that a statement of its basis was significant in that case. Determination of First Amendment rights can be no less significant.

Dated this 9th day of February, 1998.

Respectfully submitted,

/S/

MARK HERRON, Esquire
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and

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Counsel for Appellant
KYLEEN FISCHER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail to BARBARA LINTHICUM, Esquire, Executive Director, Florida Elections Commission, Room 2002, The Capitol, Tallahassee, FL 32399-0250; and ROBERT A. BUTTERWORTH, Attorney General, and JOHN H. RIMES, III, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050 this 9th day of February, 1998.

/S/
MARK HERRON

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (90)488-6151

March 3, 1998

CASE NO. 97-00435

L.T. CASE NO. FEC 94-122

Kyleen Fischer v. Division of Elections

Appellants(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing or clarification, filed February 9, 1998, is DENIED.

VAN NORTWICK AND PODAVANO, JJ., concur.
BENTON, J., dissents.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: /S/
Deputy Clerk

Copies:
Christopher R. Haughee
Barbara Linthicum
Mark Herron
John R. Rimes, III

SECTION 3.
Supreme court.—

(a) ORGANIZATION.—The supreme court shall consist of seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of his original appointment or election. Five justices shall constitute a quorum. the concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebted ness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court

of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgement of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

(c) CLERK AND MARSHAL.— The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. the marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a

deputy sheriff for such purpose.

History.—SJ.R 52-D. 1971. adopted 1972: Am. CS for SJ.R's 49. 81. 1976. adopted 1976. Am. SJ.R 20-C. 1979. adopted 1980. Am HJ.R. 71. 1986. adopted 1986.

STATE OF FLORIDA
FLORIDA ELECTIONS COMMISSION

DIVISION OF ELECTIONS,
Petitioner,

vs.

CASE NO. FEC 94-122

KYLEEN FISCHER,
Respondent.
_____/

RESPONDENT'S PROPOSED FINAL ORDER

Pursuant to notice, the above matter was heard before the Florida Elections Commission in Tallahassee, Florida on June 6, 1996 and in Orlando, Florida on August 2, 1996.

APPEARANCES

For Petitioner: Barbara Linthicum, Esquire
Florida Elections Commission
The Capitol, Room 2002
Tallahassee, Florida 32399-1007

For Respondent: Christopher R. Haughee, Esquire
Akerman, Senterfitt & Eidson, P.A.
216 South Monroe Street, Suite 200
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether Kyleen Fischer violated Section 104.271(2), F.S., as alleged in the Order of Probable Cause issued by the Florida Elections Commission on February 9, 1996.

PRELIMINARY STATEMENT

This action arose upon the filing of a sworn complaint against the Respondent with the Division of Elections. The Division of Elections conducted an investigation and found no probable cause existed to believe Ms. Fischer had violated Section 104.271(2), F.S. The Complainant timely appealed the Division's finding to the Florida Elections Commission. The Commission after a hearing and consideration of the Division's Statement of Findings, documents submitted by the Complainant, video and audio tapes and the arguments of the Division and the Complainant, found there was probable cause to believe that Ms. Fischer had violated Section 104.271(2), F.S., in relation to two separate campaign advertisements. The Commission issued an Order of Probable Cause on February 9, 1996 informing Respondent of her right to a hearing. Respondent timely requested a formal hearing and further requested that the matter be referred to the Division of Administrative Hearings for hearing. After the filing of a motion and hearing, the request to refer the matter to the Division of Administrative Hearings was denied. Thereafter the matter was set for formal hearing before the full Commission.

The cause came on for hearing as noticed. Petitioner presented the testimony of David S. Bradford, T. H. "Tom" Poole, Sr., Sandra T. Green, and Kyleen Fischer.

The Respondent presented the testimony of Ron Phillips.

The Petitioner offered exhibits 1-17, 20, 22-24 which were admitted into evidence without objection. Petitioner offered exhibit 25, a composite exhibit, which was admitted into evidence over objection. One exhibit was offered on behalf of Respondent.

The parties presented a Stipulation related to one of the campaign advertisements which was accepted by the Commission.

Two separately numbered transcripts, one from each hearing site, were issued. References to the transcript(s) will be identified as I-T____ [indicating the transcript from the Tallahassee hearing] and II-T____ [indicating the transcript from the Orlando hearing] followed by the appropriate page number(s). References to the Petitioner's exhibits will be identified as P. Ex. ____ followed by the appropriate number. References to the Respondent's exhibit will be identified as R. Ex. 1. References to the joint stipulation will be identified as Stipulation.

FINDINGS OF FACT

GENERAL

1. Kyleen Fischer was the Republican candidate for the Lake County School Board, District 5 seat, in the 1994 general election. She had primary opponents in the first and second primaries. (II-T32-34) Ms. Fischer previously served as a School Board member from 1982 to 1986. She was defeated for reelection in 1986. (II-T104)

2. Sandra Green was the Democratic candidate for the Lake County School Board, District 5 seat, in the 1994 general election. Ms. Green was the incumbent, having been initially elected to the Board in 1990, when she ran as a Republican (Exhibit 15). She had no primary opponents in 1994. (II-T31)

3. The Fischer campaign was run informally from Ms. Fischer's house with a volunteer staff consisting of her daughter Leah; a friend, Judy Susie Farley, who served as campaign manager; Ron Phillips, a family friend who served as adviser/consultant; and other family members and friends assisting. (II-T112, 142-143, 168)

4. During the campaign, Ms. Fischer developed a written Ten Point Education Platform to provide a definitive statement of her position on various issues. No other candidate had such a written platform, and Ms. Fischer's platform served to distinguish her from other candidates. (II-T143, 233) The platform was distributed by mail and as a handout during the general election campaign. (II-T143-144; P. Ex. 11, 12)

THE FLIER

5. During the 1994 general election campaign, the Kyleen Fischer campaign produced a political advertisement in a mailing flier format (hereinafter referred to as "the flier"). Kyleen Fischer reviewed and approved the flier prior to it being circulated. (II-T76-77; P. Ex. 13)

6. The flier dealt with the issue of the possible consolidation of Eustis High School and Umatilla High School, and was mailed to residents in Umatilla, a community of approximately 2,200 people. (II-T145, 149, 153; P. Ex. 13)

7. The consolidation issue had been brought to the attention of the campaign by Holly Newby, editor of The North Lake Outpost, a weekly newspaper circulated in the Umatilla area, as an issue of current concern to the residents of Umatilla. Local resident, Paul Bryan, a neighbor of Ms. Fischer, also shared that concern with the campaign. Leah Fischer and Holly Newby researched past issues of The North Lake Outpost and found the only article on the issue in the November 26, 1992 edition. (II-T77, 230; P. Ex. 23; Stipulation)

8. Based on the November 26, 1992 article, Leah Fischer, Ron Phillips and Kyleen Fischer participated in the preparation of the design, layout and copy of the flier. (II-T78, 169; Stipulation)

9. The flier production, printing and postage was paid for by the Fischer campaign. (Stipulation; P. Ex. 6)

10. The following statements contained in the flier are alleged to be violations of §104.271(2), F.S.:

a. One school board candidate wants to close Umatilla High School. (II-T19-20; P. Ex. 13)

b. A group of parents and teachers from Eustis and Umatilla, under the guidance of school board member Sandra Green are examining the possibility of consolidating Umatilla and Eustis High Schools. (II-T23-24; P. Ex. 13)

c. "Green said ... she personally favored consolidation for Eustis and Umatilla." (II-T24-25; P. Ex. 13)

11. The flier consisted of a 8 1/2" x 11" piece of paper

folded in half. The front mailing label side contains the statement noted in paragraph 10.a. above. The top half of the inside flap consists primarily of excerpts from the article in The North Lake Outpost on November 26, 1992. The masthead of the newspaper and the date of the article are clearly displayed. The statements noted in paragraphs 10.b. and 10.c. above are set forth below the masthead. The statement noted in paragraph 10.c. above is contained in a box and the statement is clearly attributed to "The North Lake Outpost." Below the box is a line of stars serving as a definition break. Below the stars, on the bottom half of the inside of the flier and continuing on the back flap, the flier contains election campaign language regarding Kyleen Fischer's position against consolidating Umatilla High School. (II-T80-81, 169-170; P. Ex. 13)

12. The suggestion to consolidate the two schools was first made by Sandra Green at a 1992 school board budget workshop on facilities' needs. No other board members expressed support for the suggestion at the workshop. (II-T14-16, 58; Stipulation)

13. Subsequent to the 1992 workshop, Sandra Green held a meeting to which she invited parents, teachers, former students of hers who were residents of the communities affected, as well as representatives from a recently consolidated school in south Lake County. The meeting was held in late October or early November 1992 and was attended by approximately 12-15 persons. (II-T15-16, 65; Stipulation)

14. Umatilla residents at the meeting expressed opposition to consolidation. Sandra Green agreed to arrange a visit to Lyman High School, another consolidated school in the area. Prior to scheduling the visit to Lyman High School, Sandra Green learned that some Umatilla residents had met to organize opposition to consolidation. Sandra Green never scheduled the

visit to Lyman High School and did not pursue the issue of consolidation thereafter. Ms. Green did not communicate to anyone that she had dropped the issue and did not have any other contact with the opponents to convey that she had abandoned the issue. (II-T17, 26-27, 57-60).

15. The newspaper article was published several weeks after the meeting. Though Sandra Green spoke to the reporter who was writing the article, she did not receive or otherwise obtain a copy of the article until the flier was circulated during the 1994 general election campaign. The article accurately quoted Sandra Green. (II-T18, 54-57; P. Ex. 23).

16. Leah Fischer and Ron Phillips researched the consolidation issue in conjunction with the production of the flier. They found no other newspaper articles or other public statements by Sandra Green on the issue. Ms. Green was not aware of any other published articles on the issue. (II-T57, 77-78, 169-170; Stipulation).

17. Ms. Green was serving her first term on the school board. The consolidation issue arose late in 1992, about midway through her term. (Stipulation)

18. Ron Phillips testified that, based on his extensive experience in campaigns, an incumbent's entire record, especially that developed during the current term, is relevant and subject to scrutiny and comment during an election campaign. The 2 year difference here was not significant. (II-T172-173)

19. The boxed quote noted in paragraph 10.c. above is a portion of a longer statement contained in The North Lake Outpost article. The complete statement in the article reads,

"Green said while she personally favored consolidation for Eustis and Umatilla, and the expanded curriculum it would bring, that it would ultimately be up to the parents to decide whether to proceed with the concept or not." (Stipulation; P Ex. 23) Ron Phillips testified that the boxed quote in the flier should have ended with elipses (3 dots) but that the printer failed to show that. (II-T171) Neither Kyleen Fischer nor Ron Phillips thought that the conditional or qualifying language affected Ms. Green's personal position. (II-T149, 171)

20. Neither Kyleen Fischer nor Ron Phillips had any concerns that the flier was inaccurate or misleading. The relevant statements in the flier were extracted from a published newspaper article, the source and date of the article are clearly noted in the flier, and research failed to reveal any contrary or conflicting information. It was considered an appropriate issue for comment and the campaign received no complaints about the flier during the campaign. (II-T144-145, 170; Stipulation; P. Ex. 13)

21. In May 1996, Ms. Green stated that she still personally considered consolidation of the two schools a good idea. (Stipulation). In her hearing testimony, Sandra Green did not deny that she still personally supported consolidation, but distinguished her personal and professional opinions from any action she took as a school board member. (II-T 25, 27). That same distinction is evident in her statement contained in the newspaper article. (Stipulation; P. Ex. 23). Even Ms. Green concedes that it is a matter of semantics and the flier statement is simply taken out of context. (II-T24-25). That distinction does not affect the veracity of the statement contained in the flier; it is not a false statement.

22. Ms. Green's consolidation proposal contemplated Eustis

Middle School moving to Eustis High School and Umatilla Middle School moving to Umatilla High School, and the construction of a new consolidated high school to replace both existing high schools. (II-T15) This would effectively close Umatilla High School. Accordingly, the statement located on the front flap of the flier is not false.

23. The statement on the inside flap referred to in paragraph 10.b. is an accurate reproduction of the original newspaper article. The flier plainly displays the date and source of the statement. The use of the present verb tense is consistent with the attribution source and date. (Stipulation; P. Ex. 13) The statement is not false.

RADIO ADVERTISEMENT

24. During the last week of the general election campaign, the Kyleen Fischer campaign produced a radio advertisement ("the ad") which stated, in part, "The NAACP has endorsed her opponent, Sandra T. Green." (P. Ex. 14). The ad aired three times, twice on the Saturday immediately prior to the election and once on Monday morning, the day before the election. The air time was paid for by the Fischer campaign. (II-T119, 121, 150, 186)

25. The ad was produced, including the drafting of the script, by Ron Phillips. Kyleen Fischer reviewed and approved of the ad prior to its airing. (II-T84, 125, 150, 160, 175-176)

26. The statement in the ad that the NAACP had endorsed Sandra Green is admittedly false. (II-T84)

27. The statement in the ad that the NAACP had endorsed

Sandra Green was based on information supplied by Tom Poole to Ron Phillips on Thursday or Friday prior to the election when Mr. Phillips encountered Mr. Poole at the offices of the Lake Sentinel, a local newspaper. (II-T176)

28. In 1994, Tom Poole was the President of the Tri-City Branch of the NAACP. He had served as the President since 1968. He was also serving as state President of the NAACP, Chairman of the Fifth Region of the NAACP (which includes 7 southeastern states), and a member of the National Board of the NAACP. (I-T150-152, 187-188; P. Ex. 24). Tom Poole was one of only 3 persons in the United States to serve as a local, state, and national officer of the NAACP. (P. Ex. 24). Mr. Poole's affiliation with the NAACP is well known in the community. (II-T185, 232-233)

29. The Constitution and By-Laws for branches of the NAACP provide for a political action committee to increase registration and voting and to work for a favorable legal and legislative environment. The committee is directed to be nonpartisan and is prohibited from endorsing candidates. This applies to all levels of the NAACP. (I-T152-153; P. Ex. 1).

30. In 1994, Tom Poole was also serving as President of the Lake County Voters League, a position he had held since he founded the organization in 1978. The Voters League was founded to provide and promote voter education, voter participation and voter registration. It also offers guidance, through endorsements of candidates, to the minority community regarding candidates who may be amenable to help solve problems in the minority community. (I-T153, 166).

31. Tom Poole taught in the public schools of Lake and Orange Counties for 39 years, primarily as a science and

physical education teacher and coach. He was active in the Lake County Education Association, serving as an officer and labor negotiator. Mr. Poole was actively involved in the civil rights movement. In 1978, he was appointed by Governor Askew to serve on the Florida Human Relations Commission. Mr. Poole was, and is, a recognized and respected leader in Lake County and is a spokesman for the minority community. (I-T150-152, 176; II-T61; P. Ex. 24).

32. The Voter's League is currently organized as a registered political committee. It has previously operated as a registered committee of continuous existence, though this registration lapsed for a period of time in the 1980s. (I-T192; R. Ex. 1). Membership dues are minimal, meetings are infrequent. The number of members is not readily known. (I-T154) The Voter's League relies on area directors as resource people. Area directors represent the various communities in Lake County. (I-T159).

33. Unlike the NAACP, the Voters League is not a high profile organization. The Voters League does not hold banquets, fund raisers or other high profile events. (I-T216).

34. The endorsement process used by the Voter's League in 1994 was informal, replacing a more formal process which previously included candidate forums and interviews with candidates. The Voters League Constitution does not contain any reference to endorsements. (I-T212; P. Ex.7) Under the informal process, the executive committee, comprised of the officers and the area directors (approximately 17-18 people), meets to discuss candidates and issues, focusing on races and issues of importance to the minority community. Responsibilities are delegated to members to obtain pertinent information about candidates and to attend campaign events,

listening and monitoring issues and positions. Approximately a week prior to the election, the executive committee meets again to decide which candidates to endorse. A sample ballot is utilized to designate endorsed candidates. These ballots are then distributed by area directors in their communities using the mail as well as hand distribution. Generally, the endorsements are distributed as late as possible, on or after the Thursday immediately prior to the election. (I-T159-165, 192-193).

35. There is no formal notification of endorsed candidates by the Voter's League. Normally, the candidate will be mailed a sample ballot by the Secretary of the Voter's League. However, because there was a new Secretary in 1994, Mr. Poole could not confirm that endorsed candidates were sent a mailed ballot. (I-T164, 209-210). Tom Poole did not notify either Ms. Fischer or Ms. Green of endorsements in 1994. (I-T210-211) Even if a mailing had been made to a candidate in 1994, the sample ballots did not have any identification of the Voters League on them. Thus, it would not have been clear who was making the endorsement(s). (I-T211; P. Ex. 8, 16)

36. The Voters League does not file statements relating to its endorsements with the Supervisor of Elections or the Division of Elections as required by Section 106.144, F.S. (I-T208)

37. In the 1994 District 5 school board race, the Voter's League executive committee could not decide who to endorse. The decision was delegated to the President, Tom Poole, in consultation with the other officers. (I-T223). In order to get the endorsement included on the sample ballot, the decision had to be made by Thursday or Friday at the latest. Tom Poole ultimately made the decision. (I-T230)

38. The difficulty of the executive committee in making an endorsement in the school board race stemmed from the candidates' positions on the Eustis Middle School (EMS) issue. The EMS issue was the single most important issue in the black community for the school board race. (I-T158, 170).

39. The existing EMS had historically served as a black educational facility. It was an historic building recommended for inclusion on the registry of historic buildings. (I-T168; II-T15).

40. There was a need to build a new middle school and the question was whether to build on the existing site or at a new location. The black community wanted the new school built at the same location. The school board had voted to build on the existing site, but the vote was 3-2 and efforts to move the school continued. Sandra Green had voted to move the school and continued to support building it in a new location. (I-T169-170; II-T41-42; P. Ex. 25). Her position was solid. (I-T170-173).

41. There were three seats on the school board up for election in 1994, and the previous vote of the board was subject to reconsideration if a new majority favored moving the school. The Green-Fischer race was viewed by Tom Poole as providing the crucial swing vote on the board. (I-T169-171, 233).

42. Kyleen Fischer favored moving the new school from the existing location and using the current facility as a vocational high school. Ms. Fischer's written Ten Point Platform for the general election clearly laid out her position in points 2 and 3. (II-T109-111, 143; P. Ex. 12).

43. Tom Poole was aware that Ms. Fischer favored a new

school—so did he—but he was not satisfied that she wanted the new school built at a new site. In his limited discussions with her, he sensed some flexibility on the issue. She had not had an opportunity to vote on the matter, and Mr. Poole held out hope that Ms. Fischer would keep an open mind. (I-T172-174, 199-202, 204, 206-207)

44. When Ron Phillips encountered Tom Poole at the Lake Sentinel office, Mr. Poole knew he had to make a decision on endorsing a candidate in the Green-Fischer race, though Mr. Phillips was not aware of that. (I-T222-224) Mr. Phillips had similar concerns at that meeting. He wanted to know what endorsements had or would be made in various races. (II-T177-179)

45. Ron Phillips was a volunteer advisor and consultant to the Kyleen Fischer campaign. He had known Ms. Fischer and her family for many years. His mother served on the school board with Ms. Fischer in the early 1980s. (II-T168)

46. Ron Phillips, who was born and raised in Lake County, had worked in politics and campaigns since adolescence. He had worked in campaigns from the local level to the national level, from grassroots volunteer to finance director to campaign manager. In addition to his volunteer work on the Fischer campaign in 1994, he also served as the campaign manager for Catherine Hanson, a county commissioner candidate. (II-T167)

47. Ron Phillips had known Tom Poole for well over 10 years. Mr. Poole had been Ron Phillips' physical education teacher in middle school. Mr. Phillips knew of Tom Poole's long and distinguished service with the NAACP. Mr. Phillips respected Mr. Poole as an educator and community leader and he trusted him. (I-T176; II-T177, 232)

48. Ron Phillips had actively sought Tom Poole's support during the campaign. (II-T194-195). However, when he encountered Tom Poole at the Lake Sentinel office late in the campaign, he had not heard from Mr. Poole or anyone else regarding that support. He was concerned that a late development could take the campaign by surprise. (II-T177-179)

49. Though both men had complementary needs and purposes, the encounter did not help either man satisfy his concern. When Ron Phillips asked Tom Poole who he was going to endorse, Mr. Poole responded by asking Mr. Phillips what Kyleen Fischer's position was on the EMS issue. Mr. Phillips' answer didn't give Mr. Poole any more comfort or any better information than he already had. In addition, Mr. Poole was not sure Mr. Phillips could officially represent Ms. Fischer's position. As a result, Mr. Poole did not push hard for a more definitive answer. He was not in a position where he could rely on the answer Mr. Phillips gave him. Tom Poole also recognized that Ms. Fischer offered only a glimmer of hope on the issue, given her previously stated position. (I-T177-180, 222-224, 233).

50. Tom Poole knew Ron Phillips was interested in learning about the endorsements, especially for Kyleen Fischer's race. It was a question Mr. Poole knew he could not answer for two reasons. First, the endorsement decision had not been made. The executive committee had deferred the issue, and it was up to Mr. Poole and the other officers to decide. Secondly, the Voter's League does not routinely advise people about their endorsements. (I-T226). The endorsements are primarily targeted to Voter's League members and others in the minority community. (I-T166, 226, 232; P. Ex. 15).

51. So, when Ron Phillips asked about the endorsement, Tom Poole did not give him the satisfaction he sought. Mr. Poole described his response on a radio talk show on the Monday just prior to election day, only a couple of days after the encounter.

> And my answer was of a professional politician of long-standing. I gave him an answer that said nothing to him. It indicated to him that I did not endorse his candidate because a decision had not been made. So in taking that answer I gave him, I don't even remember how I said it....

(emphasis added) (I-T225; P. Ex. 15).

52. Though neither Tom Poole nor Ron Phillips can recall exactly what was said, it is clear Mr. Poole did not give Mr. Phillips a direct answer. He did not tell him the truth, that no endorsement had yet been made, that, even if it had been made, he could not tell Mr. Phillips because it was contrary to established policy. Instead, he chose to confuse him with political double-talk. (I-T177-179, 232).

53. Tom Poole considers himself an "average country politician." He does not use the direct approach to obtain information. Even when he spoke to Ms. Fischer during the last month of the campaign, he did not ask her directly about her position on the EMS issue. (I-T202-203).

54. Ron Phillips testified that Tom Poole told him that "we are going to go with the other lady." (II-T177, 208) Mr. Phillips was surprised and shocked at this endorsement. He knew Sandra Green's position was diametrically opposed to Mr. Poole's. (II-T178, 215-216). Mr. Phillips then asked about another important race—the county commission race between

Hope Lamb and Bill Good. Mr. Poole quickly and directly told him that Bill Good had that endorsement. (I-T179-180, 226-227; II-T178). Mr. Phillips then returned to the endorsement in the Green-Fischer race and asked Mr. Poole to explain. Mr. Poole's response was evasive, hemming and hawing, with a lot of body language. (II-T177-178). Mr. Phillips told Mr. Poole he had made a terrible mistake with his endorsement, to which Mr. Poole did not respond. (I-T182, 236-238).

55. Despite his campaign experience, Ron Phillips was not aware of the existence of the Voter's League. He had never seen a sample ballot endorsement or heard of Voters League endorsements. (I-T229;II-T189-192, 196) Neither had Kyleen Fischer. (I-T231; II-T146, 151-152) To Ron Phillips, Tom Poole personified the NAACP; they were alter egos in Lake County. (II-T185, 232-233). Ron Phillips was not aware that the NAACP could not endorse or give support to candidates. (II-T184-185, 188)

56. Tom Poole is aware of his high profile with the NAACP. (I-T187-188; 229). When people refer to him or the NAACP in an election or campaign context about support for candidates, he assumes they mean the Voter's League. (I-T178-179). He assumes that astute politicians know the Lake County Voter's League exists. He expects to be approached by candidates because of his long political activity. (I-T168, 195-196, 248).

57. Based on his conversation with Tom Poole, Ron Phillips assumed that the endorsement of Sandra Green was by the NAACP, though Mr. Poole had not so specified. (II-T177, 189, 208, 236). He called Kyleen Fischer to tell her what he had learned. (II-111, 180, 199)

58. Kyleen Fischer was also shocked at this news. It came as a surprise to her since Sandra Green had been saying throughout the campaign that Ms. Fischer had Tom Poole's endorsement. Ms. Green had also stated during the campaign that it was her belief that a candidate could not get Mr. Poole's endorsement unless they were with him on the EMS issue. (II-T74, 117-118, 161-162, 215; P. Ex. 11)

59. Ron Phillips recommended an advertisement in response because he was concerned that the endorsement would be used by the Democratic Party against Ms. Fischer. (II-T176, 179,-180, 206, 235). He was afraid the Fischer campaign would get sandbagged by the late endorsement without the opportunity to react and respond. (II-T176, 179, 219).

60. The ad was intended to reemphasize Kyleen Fischer's principled stand on issues, especially EMS. (II-T180) It was designed to champion a candidate who stood by her positions on the issues regardless of the consequences. (II-T85-104, 164, 180, 184, 233, 237)

61. The ad was also intended to correct Sandra Green's allegations during the campaign that Kyleen Fischer had Tom Poole's support. (II-T74, 121, 158, 163; P. Ex. 11)

62. It was not a negative ad aimed at either Sandra Green or the NAACP. The ad does not attack anyone or any group. It was not racially motivated or intended to create a backlash against the NAACP endorsement. (II-T218-219, 237-239) Neither Tom Poole nor Sandra Green considered the ad to be racially motivated. (I-T228-230, 242, 250-251; II-T71) The reference to the NAACP endorsement of Sandra Green was worked into the ad to head off any late breaking attack by the Democratic Party. (II-T219)

63. The ad was designed to describe the charged political atmosphere and tone of the campaign and the context of the community which had been adversely affected by the politics of the religious right/Christian Coalition and other events. This kind of campaign was new for Lake County. Republicans supporting Democrats. Union support in the primaries which was withheld in the general election. Unprecedented involvement of the school board administration in the political process. The ad refers to "political deals" generally, without specifically identifying any deals. (II-T84-104) It doesn't say the NAACP made a deal; it doesn't say Sandra Green made a deal. (P. Ex.14)

64. Ron Phillips suspected a deal or some political posturing. (I-T246-246; II-T98-104, 180-181, 208-209, 234-235) Kyleen Fischer assumed Ms. Green had changed her position on the EMS issue. (II-T113, 164) In spite of these suspicions and assumptions, the ad does not voice them. (P. Ex. 14)

65. Kyleen Fischer admits the statement—that the NAACP has endorsed Sandra Green—is false. (II-T84) The statement is false not just because it refers to the NAACP. The statement is false because there was no endorsement of Sandra Green, by any organization associated with Tom Poole. The statement would be false even if it had referred to the Voter's League, instead of the NAACP.

66. Initially, both Ron Phillips and Kyleen Fischer thought their error was citing the NAACP as the endorsing group. (II-T187-188; P. Ex. 15). Both publicly apologized to the NAACP and immediately pulled the ad from the air. (II-T146, 188; P. Ex. 15)

67. There was no ill-will between Ms. Green and Ms. Fischer. There was no evidence that the campaign had been marked by personal attacks or negative ads. The campaign was conducted in a friendly, civil manner, on the issues. This is clear from the televised forum which aired on cable television. (II-T64; P. Ex. 11).

68. Though Ms. Fischer had received the Voter's League endorsement in her 1982 campaign and in the 1994 primaries, Ms. Fischer, herself, was not aware of those endorsements. (II-T52, 104-108, 155; P. Ex. 11). During the 1994 general election campaign, Sandra Green repeatedly stated that Kyleen Fischer has Tom Poole's endorsement. In the televised forum which was admitted as Petitioner's Exhibit 11, Ms. Green does not refer to the Voter's League or the NAACP during her statement about such an endorsement. (II-T47-48, 107-108; P. Ex. 11). Ms. Green offered no support for her statement, and none was provided to Ms. Fischer from any source. (II-T52, 104-108)

69. Because of the EMS issue, any such support or endorsement would have been an indication ~~of~~ the candidate's stand on the new school. (II-T74, 181, 223; P. Ex. 11) Since Kyleen Fischer's position was nearly identical to Sandra Green's, Ms. Fischer viewed any allegation by Ms. Green of such support or endorsement as an attempt to mischaracterize her position and hurt her with voters. (II-T73-74, 111, 159)

70. The 1994 Voter's League sample ballot endorsements do not contain any identification of the Voter's League. (I-T211; P. Ex. 8, 16). The sample ballot endorsement for the second primary, which was received as Petitioner's Exhibit 8, has handwritten comments on it. It was not distributed with those comments. The general election sample ballot, which is

Petitioner's Exhibit 16, does note Tom Poole as President and Sannye G. Jones as Secretary/Treasurer, but no organization is listed. Likewise, there is an address at the top, and at the bottom of the ballot there is a boxed group of phone numbers to call for more information in various communities. But the sample ballot fails to identify any organization. Thus, even if Ms. Fischer had received a copy of the sample ballots, it would not have been obvious from whom they were sent. (P. Ex. 8, 16).

71. Neither Ron Phillips or Kyleen Fischer made any attempt to verify the information about the NAACP endorsement of Sandra Green. (II-T118, 185-186)

72. Ron Phillips and Kyleen Fischer knew, respected and trusted Tom Poole and had no reason to doubt what Tom Poole said. (II-T118, 145, 232)

73. Kyleen Fischer knew and trusted Ron Phillips. He was a long time family friend and loyal advisor. She had no doubts about the information he provided to her. (II-T112, 118, 146, 148, 156; P. Ex. 15)

74. Neither Kyleen Fischer nor Ron Phillips knew with whom to verify the endorsement other than with Tom Poole. The information came from the most knowledgeable person that they knew would have such information. (II-T147, 185-186, 232-233).

75. Even if Ms. Fischer and/or Ron Phillips had sought to verify the endorsement, the effort would have led back to Tom Poole. The Voter's League executive committee had deferred the decision to him and the other officers. The decision was ultimately made by Tom Poole. (I-T223-224, 231)

76. Both Kyleen Fischer and Ron Phillips had made efforts to contact Tom Poole during the campaign regarding his support and endorsement. Those efforts were largely unsuccessful, resulting in "phone tag." No meaningful discussions occurred. (II-123, 126, 133-135, 210, 214)

77. It is unclear whether anyone else would have been in a position to timely verify the endorsement. The ad was drafted on the Friday prior to the election and aired twice on Saturday and once on Monday morning. (II-T125, 186) Tom Poole testified that his decision was made after his conversation with Ron Phillips. There is no evidence of how and to whom he communicated his decision. Tom Poole testified that the sample ballot endorsements are given to area directors for mailing or hand distribution for delivery on the weekend prior to the election or Monday at the latest. (I-T159, 163, 165-166)

78. Kyleen Fischer did not have a minority voters coordinator in her campaign nor were any African-American supporters active in her campaign. (II-T118, 146).

CONCLUSIONS OF LAW

1. The Florida Elections Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 104.271(2), and 106.26, F.S.

2. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue. *See*, Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, (Fla. 1st DCA 1981). Accordingly, here the Division of Elections, as the Petitioner, has the burden of presenting proving that Respondent has violated Section 104.271(2), F.S.

3. Section 104.271(2), F.S., provides:

> **104.271 False or malicious charges against, or false statements about, opposing candidates; penalty.**
>
> (2) Any candidate who, in a primary election or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code. An aggrieved candidate may file a complaint with the Division of Elections pursuant to s. 106.25. The division shall adopt rules to provide an expedited hearing before the Florida Elections Commission of complaints filed under this subsection. Notwithstanding any other provision of law, the Florida Elections Commission shall assess a civil penalty of up to $5,000 against any candidate found in violation of this subsection, which shall be deposited to the account of the General Revenue Fund of this state.

4. There are three essential elements necessary for a violation of the statute:

(a) a false statement;
(b) about an opposing candidate;
(c) made or caused to be made with actual malice.

5. A violation of Section 104.271(2), F.S., subjects the offender to a civil penalty of up to $5,000. This fine is punitive in nature. As a result, the Division must prove a violation of the statute by clear and convincing evidence. Ferris v. Turlington,

510 So.2d 292 (Fla. 1987); Department of Banking v. Osbourne Stern and Co., 670 So.2d 932 (Fla. 1996). This is a higher and more demanding standard than the ordinary evidentiary burden in civil cases — preponderance of the evidence or the greater weight of the evidence. The Division has failed to carry this burden.

THE FLIER

6. There is no competent substantial evidence that the statements contained in the flier are false.

7. Two statements are alleged to be false because they are phrased in the present tense. Despite the fact that the consolidation issue had arisen two years prior to the 1994 election, it was a viable issue, capable of springing to active status at the initiative of Ms. Green or anyone else. A two year difference does not make the issue inappropriate for comment and discussion in the present tense, especially under the circumstances presented in this case.

8. The context of the issue is clearly indicated in the flier. The background information source, The North Lake Outpost, and the date the source article was published, are plainly displayed in the flier. Ms. Green conceded that the newspaper story was accurate. There were no subsequent public statements to the contrary. The use of the present tense represents fair comment under these circumstances. Those statements are not false.

9. There is no competent, substantial evidence that the statement on the front cover of the flier is false. While Sandra Green may not have ever said she wanted to close Umatilla High School, the result of her consolidation proposal would

have that effect. It is unlikely, and unreasonable to conclude, that any newly consolidated school would be named Umatilla High School given the relative sizes of the existing communities and schools. In addition, Ms. Green's consolidation concept included Umatilla Middle School moving into the current Umatilla High School facility which would require a name change for the existing school.

10. The boxed quote that Ms. Green "personally" favors consolidation is not false. Ms. Green concedes as much. She believes consolidation is an economical approach to address facility needs. That is why she proposed the concept in 1992. Her position is unchanged.

11. The Division, and Ms. Green, base the falsity of the statement on the fact that the statement is taken out of context and is incomplete. However, neither the complete statement nor the context change the truth of the statement. The complete statement in context clarifies and distinguishes Ms. Green's position as a school board member on the issue. Ms. Green has two positions—a personal position and a position as a public officer on a potential public agenda item. Her personal position regarding consolidation is unaffected by her public officer position, a point Ms. Green made abundantly clear in her hearing testimony.

THE RADIO AD

12. Only one statement in the radio advertisement is about Sandra Green. The remainder of the ad comments on the tone and context of the 1994 election campaign and on Kyleen Fischer's principled and unwavering position on the Eustice Middle School issue. Section 104.271(2), F.S., prohibits false statements about an opposing candidate. It does not punish any

other type of false statement, and it does not prohibit suggestions, implications, or innuendo contained in political advertisements. We cannot read between the lines and create a statement where none exists. We refuse to read what is not written or hear what is not spoken.

13. There is no dispute that the statement is false. Both Kyleen Fischer and Ron Phillips agree. Having satisfied the first two elements of the statute, we must now consider the issue of malice.

MALICE

14. Section 104.271(2), F.S., requires that the false statement about an opposing candidate be made with "actual malice." This is not a "reasonable person" standard; it is an objective test. Therefore, to be a violation, we must determine that Kyleen Fischer knew that the statement was false, or that she acted with reckless disregard of its truth or falsity.

15. The consideration of malice necessarily takes place in the arena framed by the constitutional guarantees of free speech contained in the First Amendment to the United States Constitution and in Article I, Section 4 of the Florida Constitution. That arena is also shaped by the seminal case of New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). That case, and its progeny, give protection to those who criticize public officials, allowing damages for defamatory falsehoods only when the statement was made with actual malice; i.e., with knowledge that it was false or with reckless disregard of its truth or falsity. This is the same standard—actual malice—required by Section 104.271(2), F.S., and these cases provide guidance for our examination of the issue.

16. In Seropian v. Forman, 652 So.2d 490 (Fla. 4th DCA 1995), the Fourth District Court of Appeal sets forth a pertinent summary:

> So great is the protection given to writers and speakers under the First Amendment that the Supreme Court has held that a *public official* ... can make out a good claim of damages for defamatory falsehood only where the official can show that the writer published a defamatory falsehood with knowledge that it was false, or with reckless disregard as to whether it was true or false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Stated differently, the burden is to show that the writer deliberately lied and falsified something or, as an alternative to a knowing lie, that the writer of a defamatory falsehood "in fact entertained serious doubts as to the truth of his publications." *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), or that he acted with a "high degree of awareness of * * * probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Moreover, the official must prove the essential fact, not with the ordinary evidentiary burden of most civil cases, called the "greater weight" of the evidence in Florida, but instead with a higher, more demanding, burden called "clear and convincing" evidence. *Id.*

(emphasis original) Seropian, *supra.*, at 493-494.

17. Elections-related and campaign-related statements are

given even greater deference by Florida courts.

> Finally, we recognize that a libel action growing out of a political campaign must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" upon candidates for public office. *New York Times Co. v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 720.

Cronley v. Pensacola News-Journal, Inc., 561 So.2d 402, 405 (Fla. 1st DCA 1990).

> It has also been held that in cases of this nature, which involve the First Amendment area and where the issue is recklessness employed in the publication of allegedly false and libelous information, that summary judgments should be more liberally granted. (*citation omitted*)

Menendez v. Key West Newspaper Corporation, 293 So.2d 751, 752 (Fla. 3rd DCA 1974).

18. It is clear that the courts tread lightly in this arena. Although this case does not involve a claim for libel or defamation, the standard(s) and analytical process are the same.

19. There is no competent, substantial evidence that Kyleen Fischer knew the statement to be false. She had no direct information about the endorsement. Despite efforts by Tom Poole and her to discuss issues of mutual concern during the campaign, no meaningful conversation had occurred. Tom Poole would not have been in a position to discuss an

endorsement until the last week of the general election, and it is unlikely he would have told Ms. Fischer of any endorsement even if there had been substantive discussions.

20. It is also clear that Kyleen Fischer was unaware of the Voter's League endorsement of her in the 1994 primaries. There was no testimony or other evidence that such an endorsement was ever communicated to Ms. Fischer. The only evidence presented on this matter was the videotape of the candidate forum in early October 1994. In that forum, Sandra Green tells Ms. Fischer that Ms. Fischer has Tom Poole's endorsement. There is no mention of the Voter's League or the NAACP. Ms. Fischer denied any knowledge of the endorsement at the forum. No other evidence or support for the endorsement was provided by Ms. Green.

21. There was no exhibit offered of a sample ballot endorsement for the first primary election in 1994. The sample ballot endorsement for the second primary which was received in evidence has no identifying markings to indicate it was from the Lake County Voter's League. It does, however, have writing on it extraneous to the sample ballot form, which suggests that the ballot was not sent out with that extraneous writing. Finally, there is no competent, substantial evidence that Kyleen Fischer ever received a copy of the second primary sample ballot endorsement.

22. Since Kyleen Fischer did not have actual knowledge that the statement was false, actual malice rests on whether Kyleen Fischer acted with reckless disregard about the truth or falsity of the statement.

23. Ms. Fischer knew and trusted Ron Phillips. She had no reason to doubt what he told her. Likewise, she respected Tom

Poole. He was the most knowledgeable person she knew who could provide the information about such an endorsement. She had no cause to believe Tom Poole would deliberately deceive or mislead her or Ron Phillips. She believed the information she received was reliable.

24. There was no competent, substantial evidence that Kyleen Fischer harbored serious doubts about the truth of the statement. The fact that she and Ron Phillips were surprised or even shocked about the endorsement is insufficient to support the finding of actual malice. Politics and campaigns regularly offer surprises depending on one's knowledge and involvement in the process. The Lake County political environment had undergone a transformation, due primarily to the emergence of conservative, religious elements. The county had been thrust into the national spotlight as a result of new policies and programs. New alliances and allegiances ("strange bedfellows") developed which were unprecedented. The existence of another surprising development, without more evidentiary support to suggest that Kyleen Fischer had serious doubts regarding the veracity of the information, does not provide the necessary foundation for a finding of malice under these circumstances.

25. There is no clear, direct evidence of malice in this case. Under the high evidentiary standard requiring proof by clear and convincing evidence, malice cannot be inferred under the circumstances presented here.

> Circumstantial evidence is often used to prove intent and is often the only available evidence of a person's mental state. However, in order to be legally sufficient evidence of [a statutory violation], circumstantial evidence must be

> inconsistent with any reasonable hypothesis of innocence. (*footnote omitted*)

The Florida Bar v. Marable, 645 So.2d 438, 443 (Fla. 1994).

26. Ms. Fischer's actions in publishing the statements at issue in this case were not unreasonable or reckless. Her actions may be subject to criticism by some, but they fall far short of malice required under the statute.

CONCLUSION

Based on the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and argument of the parties, it is

ORDERED that the complaint filed against Respondent, Kyleen Fischer, is DISMISSED.

_____

Carlos Alvarez, Chairman
Florida Ethics Commission

Respectfully submitted this 20th day of September, 1996.

/S/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Barbara Linthicum, Assistant General Counsel, Division of Elections, Room 2002, The Capitol, Tallahassee, Florida 32399-0250, this 20th day of September, 1996.

/S/

CHRIS HAUGHEE